Case No. 22-1681

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HOWARD T. LINDEN, as Personal Representative of the Estate of **TIMESHA BEAUCHAMP.**

Plaintiff-Appellant,

v.

CITY OF SOUTHFIELD, MI; MICHAEL STORMS; SCOTT RICKARD; PHILLIP MULLIGAN; JAKE KROLL, in their Individual capacities, jointly and severally,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

No. 2:20-cv-12738 (Honorable Nancy G. Edmunds, *presiding*)

DEFENDANT–APPELLEES' BRIEF

Oral Argument Requested

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendants request oral argument on this case for two reasons. First, Plaintiff has a tendency to conflate the issues and ignore all relevant allegations. Oral argument will allow the Court and Defendant to clarify any confusion. Second, the constitutional issues raised herein are novel and new, as no prior case has held paramedics/EMT liable for a constitutional violation in this Circuit. Oral argument will allow the parties and Court to thoroughly address these areas.

STATEMENT OF JURISDICTION

Defendants agree with Plaintiff's statement of jurisdiction.

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the District Court correctly decided that Defendants are entitled to qualified immunity because Plaintiff did not, nor can, plausibly plead a constitutional violation, whether under the 14th Amendment or its *DeShaney* subset of caselaw?

Defendants answer, "*Yes.*"

Plaintiff answers, "*No.*"

2. Whether the District Court correctly decided that Defendants are entitled to qualified immunity because, even if Plaintiff could plead a viable violation of a constitutional right, such a right was not clearly established?

Defendants answer, "*Yes.*"

Plaintiff answers, "*No.*"

3. Whether the District Court properly dismissed the *Monell* claim against the City of Southfield because there was no underlying violation?

Defendants answer, "*Yes.*"

Plaintiff answers, "*No.*"

4. Whether, even if there was a constitutional violation, the Plaintiff has pled sufficient factual material to support a *Monell* claim against the City of Southfield?

Defendants answer, "*No.*"

Plaintiff answers, "*Yes.*"

SUMMARY OF THE ARGUMENT

Tragedy does not equate to constitutional liability solely because a state actor is involved. This is a principle recognized by both the Supreme Court and this Circuit. In recognizing that principle, the Supreme Court has been cautious in its interpretations of the substantive due process doctrine, and specifically cautioned against extending it to scenarios that impose affirmative duties on the government, like that advocated by Plaintiff. The Fourteenth Amendment does not provide Plaintiff the relief he seeks for the unfortunate death of Timesha Beauchamp after she suffered a medical emergency and was provided, what Plaintiff alleges, was grossly incompetent medical care by government employees.

Plaintiff's arguments boil down to three simple points: 1) that Plaintiff did plead a viable constitutional violation under the *DeShaney* state-created danger doctrine or private aid doctrine; 2) that, because Plaintiff pled a viable constitutional violation, he also pled a viable *Monell* claim; and 3) that the constitutional violation was clearly established based on generic principles of the recognition of the doctrine alone.

Plaintiff is incorrect on all counts and this Court should consider the misinformed foundation of the *DeShaney* doctrine and its progeny that Plaintiff advocates. Moreover, as the doctrine is currently understood, Plaintiff's factual allegations could never support any type of *DeShaney* claim. And even if the

allegations could support a violation, this Court has never recognized such a violation, meaning that it was never clearly established. Either way, Defendants are entitled to qualified immunity.

Without an underlying violation, the District Court properly determined that the City of Southfield is entitled to dismissal of the *Monell* claim. But even setting aside the missing violation, Plaintiff failed to plead sufficient factual allegations regarding the City's conduct to support a *Monell* claim. Thus, the *Monell* claim must be dismissed regardless of the qualified immunity determination.

COUNTER-STATEMENT OF THE ALLEGATIONS

Defendants provide the below counter-statement of the allegations because Plaintiff's is confusing, glances over the specific references, does not include all proper references, and does not provide a complete picture of the allegations.

Plaintiff has acknowledged that the factual allegations supporting his Second Amended Complaint and Third Amended Complaint are the same, thus it does not matter which document is referenced. [Doc. 26, Page 17, n. 4]. Moreover, as discussed below, the District Court premised its opinion granting the dismissal on the failures of both Complaints, such that there is no need to apply an abuse of discretion review. The review can all be subsumed into a single review of the below allegations and a de novo assessment of the viability of any *DeShaney* claim.

This lawsuit arises out of a call for aid by Erika Lattimore to Southfield 911 when she found her daughter, Timesha Beauchamp, unresponsive on the morning of August 23, 2020. [*SAC*, R. 55, PageID.1680] The lawsuit was filed against the City of Southfield and four of its emergency responders: Jake Kroll and Phillip Mulligan, both Emergency Medical Technicians ("EMTs"), and Scott Rickard and Michael Storms, both paramedics. [*SAC*, R. 55, PageID.1678-1679, ¶10-14]. Per Plaintiff's allegations, the below is a summary of what happened.

Storms, Rickard, Mulligan, and Kroll responded to Lattimore's request for aid and found Beauchamp on her bed where she "appeared to be unresponsive." [*SAC*, R. 55, PageID.1680]. Lattimore provided them with information about Beauchamp's existing medical conditions and medication, as Beauchamp was already an incapacitated person and under the guardianship of Lattimore. [*AC*, R. 2, PageID.25, 28, ¶¶ 7-8, 24] Defendants administered medical care to Beauchamp, and Plaintiff takes issue with that care in this suit, because in essence, Defendants ignored signs that Beauchamp was alive before stopping resuscitative efforts.[1] [*See SAC*, R. 55, PageID.1681-1682, ¶¶ 24-30]. At 8:09 AM, Defendants Storms spoke with Dr. Darr, a physician at a local hospital, to obtain a pronouncement of death regarding Beauchamp's condition and, for purposes of this motion, intentionally relayed incorrect information about a change in Beauchamp's heart rhythm. [*SAC*, R. 55, PageID.1682, ¶¶ 32-33].

Plaintiff further alleges that after Defendants had ceased resuscitative efforts and left the home, a family member told them she felt Beauchamp's pulse and that she was still breathing. [*SAC*, R. 55, PageID.1682-1683, ¶35]. Per Plaintiff's Second Amended Complaint,[2] Defendants re-checked Beauchamp, but did not recognize

[1] The specific issues with the care provided are not germane to this motion because they do not alter the legal analysis.

[2] Defendants strongly contest these allegations as they are plainly false and against the evidence, as not even all four defendants were on scene at this time. However,

any signs of life and told Beauchamp's family that she was deceased and any indications they saw were caused by medication. [*SAC*, R. 55, PageID.1683, ¶¶36-38]. This scene played out again when a family member said she was still alive, only this time the message was conveyed through a Southfield Police Officer who was also on scene. [SAC, R. 55, PageID.1683, ¶39]. When Defendants returned to Beauchamp's room a third time, the family member stated that he observed Beauchamp's body move and gasp for air. [*SAC*, R. 55, PageID.1683, ¶40]. Defendants, again, responded that the chest movement was due to medication and Beauchamp "was in fact dead." [*SAC*, R. 55, PageID.1683, ¶41].

Beauchamp's family made arrangements for her body to be picked up by a funeral home after the medical examiner released the body. [*SAC*, R. 55, PageID.1684, ¶¶44-48]. At approximately 11:25 A.M., nearly three hours after the Defendants left, Leslie Holmes of Holmes Removal Services arrived to pick up Beauchamp and observed Beauchamp's chest move, yet Holmes still transported Beauchamp because Lattimore stated she had been assured Beauchamp was dead. [*SAC*, R. 55, PageID. 1685, ¶¶49-52]. When Beauchamp's body arrived at the funeral home fifteen minutes later, the staff noticed that her eyes were open and she was still breathing. [*SAC*, R. 55, PageID.1685, ¶53]. They immediately called 911

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for purposes of Rule 12(b)(6) motion, Defendants accept these allegations as they do not alter the argument or outcome of this motion.

and Beauchamp was transported to the hospital. [*SAC*, R. 55, PageID.1685, ¶54]. Beauchamp later died on October 18, 2020. [*SAC*, R. 55, PageID.1688, ¶69].

PROCEDURAL HISTORY

Defendants agree with the relevant procedural history outlined by Plaintiff on pages 13 and 14 of his brief. Defendants dispute the Plaintiff's characterization of the District Court's order. Therefore, Defendants provide the below summary of the District Court's holdings.

First, the District Court held that, as a rule, there is no constitutional "right to competent medical assistance or rescue services." [*Dismissal Opinion*, R. 100, PageID.2681]. The District Court next held that the state created danger doctrine is "narrow exception" to that rule. [*Dismissal Opinion*, R. 100, PageID.2681]. The District Court then recognized that within this Circuit, the state created danger doctrine has been applied in two relevant manners: the general affirmative act analysis, and the possible private aid application.

Turning first to the general application, which requires "an affirmative act that increases the victim's risk of harm from private acts of violence," the District Court first held that Plaintiff could not satisfy the private act of violence requirement. [*Dismissal Opinion*, R. 100, PageID.2681 (citing *Sexton v. Cernuto*, 18 F.4th 177, 186 (6th Cir. 2021)]. The District Court held that "there are no allegation that the First Responders' conduct exposed Timesha to private acts of violence." [*Dismissal*

Opinion, R. 100, PageID.2682]. In doing so, the Court specifically rejected Plaintiff's belated argument[3] that "premature preparation of a person for funeral processing" constitutes a private act of violence. [*Dismissal Opinion*, R. 100, PageID.2682]. The Court likened this case to *Willis v. Charter Twp. of Emmett*, 360 F. App'x 596 (6th Cir. 2010), wherein very similar conduct occurred, and wrote that "to hold that these circumstances amount to private acts of violence would turn the general rule—that state actors have no constitutional duty to render competent medical services or rescue services—on its head." [*Dismissal Opinion*, R. 100, PageID.2684].

Next, the District Court turned to the private aid application. [*Dismissal Opinion*, R. 100, PageID.2684]. After recognizing the doctrine's uncertain origin in the unpublished *Beck* opinion, the Court rejected Plaintiff's argument that the Defendants' alleged dissuasion amounted to prohibiting private rescue attempts as contemplated in *Beck*. The Court relied on this Court's exploration of the doctrine in *Jackson*, *Willis*, *Tanner*, and *Hermann*. [*Dismissal Opinion*, R. 100, PageID.2686]. The Court noted that there were no allegations that the family sought private aid, or any aid outside of the advice of Defendants. [*Dismissal Opinion*, R. 100, PageID.2686].

[3] The District Court noted that it was not Plaintiff that raised this argument, but the Magistrate Judge who considered, "on his own initiative," whether the facts could support this theory. [*Dismissal Opinion*, R. 100, PageID.2682].

Next, the District Court considered, and rejected Plaintiff's argument that it was applying too high of an evidentiary standard. [*Dismissal Opinion*, R. 100, PageID.2686]. The Court explained that it was analyzing Plaintiff's allegations, as if true and in a light most favorable to Plaintiff. [*Dismissal Opinion*, R. 100, PageID.2687]. The Court also explained that, to the extent Plaintiff was challenging its application of the general state created danger doctrine's requirements, the call to Dr. Darr did not create or increase the risk of harm that Beauchamp was exposed to, as required under the doctrine, because "[Beauchamp] was experiencing a medical emergency prior to the [Defendants] arrival and was not exposed to private acts of violence as a result of their actions." [*Dismissal Opinion*, R. 100, PageID.2686-87].

The District Court then summarized that Defendants are entitled to qualified immunity because Plaintiff failed to allege a constitutional violation with both the generic Fourteenth Amendment allegations[4] and the specific state created danger doctrine. [*Dismissal Opinion*, R. 100, PageID.2689]. In footnote, the Court stated that any right also could not be clearly established. [*Dismissal Opinion*, R. 100,

[4] On his own, Plaintiff has only ever alleged that Beauchamp had a "right to adequate and sufficient medical care and/or treatment such that her life would be preserved and she at all times would be free from needless unjustified and preventable pain, suffering, and deterioration of her health and well-being." [*SAC*, R. 55, PageID.1689, ¶74]. Defendant first raised the *DeShaney* theories and the Magistrate Judge, as noted by the District Court, independently theorized whether facts could meet the state created danger doctrine. [*DFs Rule 12(c) Motion*, R. 50, PageID.1557-1575; *Dismissal Opinion*, R. 100, PageID.2682].

PageID.2689, n. 7]. The District Court concluded that because there had been no violation, the City of Southfield could not be liable under a *Monell* theory. [*Dismissal Opinion*, R. 100, PageID.2689-90].

STANDARD OF REVIEW

This Court reviews the District Court's opinion on Defendants' Rule 12(b)(6) motion *de novo*. *Republic Bank & Tr. Co. v. Bear Stearns & Co.*, 683 F.3d 239, 246 (6th Cir. 2012).

A motion under Federal Rule of Civil Procedure 12(b)(6 tests the sufficiency of the complaint. *Riverview Health Inst. L.L.C. v. Medical Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010).

A complaint must allege all material elements of a "viable legal theory" to be sufficient. *Commercial Money Ctr., Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007). A court must accept all well-pled factual allegations as true, but "need not accept the plaintiff's legal conclusions or unwarranted factual inferences as true." *Id*. The motion is generally confined to the pleadings, but a court may consider other materials, such as "exhibits, public records, and items appearing in the records of the case" when they are verifiable and/or public records appropriate for judicial notice. *Bailey v. City of Ann Arbor*, 860 F.3d 382, 386 (6th Cir. 2017) (holding that the district court appropriately considered a video that captured the entire event that was in dispute and contradicted the plaintiff's allegations).

If, after construing the complaint in a light most favorable to the non-moving party, the court determines that plaintiff has failed to plead "enough facts to state a

claim to relief that is plausible on its face," the court must grant the moving party judgement as a matter of law. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Qualified immunity is an appropriate basis for dismissal under Rule 12(b)(6). *Jackson v. Schultz*, 429 F.3d 586, 589 (6th Cir. 2005). A court can dismiss a complaint under Rule 12(b)(6) "if it is clear that no violation of a clearly established constitutional right could be found under any set of facts that could be proven consistent with the allegations or pleadings." *Id*. When read in conjunction with the Sixth Circuit's holding that undisputable evidence that clearly contradicts the events referenced in a pleading can be considered, this Court can dismiss Plaintiff's amended complaint if it is clear that the events as established by the public records and pleadings could never support a violation of clearly established law. See *Bailey*, 860 F.3d at 386, and *Jackson,* 429 F.3d at 589.

Plaintiff argues that the Court should review the denial of its Third Amended Complaint for an abuse of discretion. [Doc. 26, Page 35]. While technically correct, the logic of this argument is flawed. The District Court held that Plaintiff's arguments in his motion to amend were "intertwined with the arguments raised in Defendants' motion to dismiss and it would be inefficient to address the arguments twice." [*Dismissal Opinion*, R. 100, PageID.2681]. The District Court was correct that these issues intertwined and Defendants now propose that this Court only conduct a de novo review of the legal principles underlying the dismissal because

they are the same reasons the Third Amended Complaint is futile, especially since, as Plaintiff acknowledged, the main factual allegations remain the same across both pleadings. [Doc. 26, Page 17, n. 4]. Defendants arguments below address the issues from this perspective.

COUNTER-ARGUMENT

The District Court correctly ruled that Defendants were entitled to qualified immunity under both prongs of the doctrine's two-prong analysis. Defendants will first address the proper qualified immunity analysis and then apply it to demonstrate why the District Court reached the correct conclusions. Lastly, Defendants will address why the District Court correctly dismissed the claim against the City of Southfield.

I. THE QUALIFIED IMMUNITY ANALYSIS

Plaintiff's liability theories are not viable and subject to dismissal under Rule 12(b)(6) because the individuals are entitled to qualified immunity under both prongs of the traditional two-step analysis. *Columbia Nat. Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995) (quoting *Allard v. Weitzman*, 991 F.2d 1236, 1240 (6th Cir. 1993)) (holding that complaints must state viable claims).[5] It is well-known

[5] Qualified immunity decisions are appropriate at the pleadings stage. The Supreme Court has never discouraged the practice and has engaged in the exact analysis. *See Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (discussing qualified immunity as right to avoid pretrial matters like discovery and analyzing denial of qualified

that the doctrine of qualified immunity protects government officials from civil liability to the extent that their conduct does not violate clearly established statutory or constitutional rights. *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (quoting *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012). As originally announced in *Saucier v. Katz*, there are two parts to a qualified immunity analysis: (1) whether a constitutional right was violated, and (2) whether the right was clearly established. 533 U.S. 194 (2001); *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

The plaintiff bears the burden of demonstrating that a defendant is not entitled to immunity once the defense is raised. *Livermore v. Lubelan*, 476 F.3d 397, 403 (6th Cir. 2007). To carry this burden and survive a qualified immunity defense, the plaintiff "cannot simply assert a constitutional violation and rely on broadly stated general rights..." *Cooper v. Parrish*, 203 F.3d 937, 951 (6th Cir. 2000). Instead, he must be able to allege facts that could support a plausible constitutional violation. *Id*.

After pleading facts that could support a constitutional violation, the plaintiff must also demonstrate that the constitutional right was clearly established. A right is clearly established if it was "so clear that *every* reasonable [official]…would have recognized that [the conduct was not permitted]—and not just in the abstract but in

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immunity at motion to dismiss phase); *Ashcroft v. Iqbal*, 556 U.S. 662, 669, 671-86 (2009) (addressing qualified immunity at the motion to dismiss stage).

the *precise* situation [the official] was facing." *Ashford v. Raby*, 951 F.3d 798, 801 (6th Cir. 2020). This prong is, itself, a two-step process. First, the analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. Therefore, the constitutional right "must be defined at the appropriate level of specificity to determine whether it was clearly established at the time the defendants acted." *Risbridger v. Connelly*, 275 F.3d 565, 569 (6th Cir. 2002). This does not require that the specific factual scenario in each case have been previously addressed, but that the unconstitutional nature of such conduct "be apparent." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902 (6th Cir. 2004) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Once a right is defined with particular clarity, the second step is to determine whether existing case law would have notified the actor that his conduct was prohibited. *Id.* (citing *Saucier*, 533 U.S. at 202). For such notice to exist, there must be binding precedent that makes the unlawfulness of the conduct readily apparent to a reasonable person in the actor's position (e.g. every police officer, every EMS provider, every clerk, etc.). *Risbridger*, 275 F.3d at 569. The law must clear enough that "*any reasonable* official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard,* 572 U.S. 765, 779 (2014). As applied in the Sixth Circuit, this requires that the law be so clear "that every reasonable [official] in [the official's] shoes would have recognized that [his actions were

unconstitutional]—and not just in the abstract but in the precise situation [the official] was facing." *Ashford v. Raby*, 951 F.3d 798, 801 (6th Cir. 2020).

The Supreme Court clarified in October 2021 that the search for binding precedent first looks to the Supreme Court, then, possibly, to the relevant Circuit Court. *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam). It does not look to unpublished opinions, district court opinions, or out of circuit precedent. *Id.*

The District Court correctly applied this two-step analysis in determining that Plaintiff did not allege a viable constitutional violation, nor a violation of clearly established law.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT PLAINTIFF FAILED TO PLEAD A VIABLE CONSTITUTIONAL VIOLATION

The District Court correctly determined that Plaintiff did not, and could not, plead a viable constitutional violation. As noted above, Plaintiff independently pled a generic constitutional violation under the Fourteenth Amendment, and, after raised by everyone else, advanced the more specific state created danger theory. [*Dismissal Opinion*, R. 100, PageID.2689]. Neither of these theories can ever be supported by Plaintiff's factual allegation, nor should this Court indulge these theories as they are inconsistent with the precedent of this Circuit and that of the Supreme Court.

A. There is No Constitutional Right to Adequate Medical Care and/or Rescue

Plaintiff's generic claim is easiest to address first. "It is not a constitutional violation for a state actor to render incompetent medical assistance or fail to rescue those in need." *Jackson v. Schultz*, 429 F.3d 586, 590 (6th Cir. 2005) (citing *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989); *Baker v. City of Detroit*, 217 F. App'x 491, 494 (6th Cir. 2007); *Gooden v. Batz*, No. 3:18-CV-00302, 2020 WL 6146395, at *6 (S.D. Ohio Oct. 20, 2020), Report and Recommendation adopted by No. 3:18-CV-302, 2021 WL 2389727 (S.D. Ohio June 10, 2021); *Peete v. Metropolitan Gov't of Nashville and Davidson Cnty.*, 486 F.3d 217 (6th Cir. 2007); *Brown v. Commonwealth of Pennsylvania Dep't of Health Emergency Med. Servs. Training Inst.*, 318 F.3d 473, 478 (3d Cir. 2003) (holding "that there is no federal constitutional right to rescue services, competent or otherwise").

The law recognizes that the government owes a duty to provide adequate medical care to those in its custody, but has not extended this duty to free citizens generally. *See Gooden*, 2020 WL 6146395 at *4 (explaining rights extended to inmates and pretrial detainees and citing *Griffith v. Franklin Cty.*, 975 F.3d 554, 566 (6th Cir. 2020), *Blackmore v. Kalamazoo County*, 390 F.3d 890, 895 (6th Cir. 2004), and *Baynes v. Cleland*, 799 F.3d 600, 618 (6th Cir. 2015)). Any extension of the duty to provide medical care is best viewed through the lens of *Deshaney*, discussed

below. But, as a free member of society, Timesha Beuachamp held no general right to adequate medical care; thus, to the extent Plaintiff's claim is premised on this assertion, the District Court properly concluded that these allegations could not support a constitutional violation.

B. Plaintiff's Factual Allegations Could Never Support a Constitutional Claim Under *DeShaney* and this Circuit's Applications of it.

Plaintiff asserts that he can support a claim under two applications of this Circuit's state created doctrine: general and private aid. In the District Court, Defendants argued that not only could Plaintiff not satisfy any of this Circuit's extensions of said doctrine, but that this Circuit had violated its own precedent and the Supreme Court's rulings by adopting this doctrine. An exploration of the origins of this doctrine demonstrates not only why Plaintiff cannot plead a state created danger claim, but, also, why this Court should reject the doctrine itself.

1. The Supreme Court has only ever held that the Fourteenth Amendment does not create a duty for the government to provide services when an individual's liberty is not restrained.

In *Deshaney*, the Supreme Court was confronted with an "undeniably tragic" situation. *DeShaney*, 489 U.S. at 191. A young boy had suffered horrible abuse by his father; such abuse eventually led the boy, Joshua, to suffer severe brain damage. *Id.* at 192-93. He and his mother sued alleging that his Fourteenth Amendment rights were violated when the state failed "to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known." *Id.* at 193.

The district court dismissed the case and the Seventh Circuit affirmed. *Id.* at 193-94. The Supreme Court accepted the petition to address "inconsistent approaches taken by the lower courts in determining *when, if ever, the failure of a state or local government or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights*…and the importance of the issue to the administration of state and local governments." *Id.* at 194 (internal citations omitted).

The Supreme Court first looked to the text and history of the 14th Amendment. *Id.* at 194-197. Concluding first that Joshua's claim sounded in substantive, not procedural, due process, the Court framed the question as whether the state was "categorically obligated to protect him in these circumstances." *Id.* at 195. The text of the Amendment did not require such protection from "private actors," nor was it intended to guarantee a minimum level of safety. *Id.* Instead, it was intended to limit "the State's power to act," i.e., it was a restraint of power, not an affirmative guarantee the State would exercise its power in certain way. *Id.*

The Court next discussed its similar interpretations in previous Fourteenth Amendment decisions. *Id.* It discussed an array of cases where it held that the State did not have an affirmative duty to provide aid, "even where such aid may be necessary to secure life, liberty, or property interests." *Id*. From here, the Court concluded that "it follows that the State cannot be held liable under the [Due Process]

Clause for injuries that could have been averted had it chose to provide [protective services].” *Id.* 196-97.

The Court’s most explicit rejection of the current *Deshaney* doctrine lies in the next portion of its analysis: whether a duty can arise based on a special relationship that arose through the State’s knowledge of the danger Joshua faced and its prior effort to protect him. *Id.* at 197. The Court’s response was clear when it wrote, “We reject this argument.” *Id.* The Court discussed how it had previously acknowledged that an affirmative duty of protection arose only under limited circumstances wherein the state “so restrain an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provider for his basic human needs.” *Id.* at 200. Thus, the underlying principle of *Deshaney* is that a State’s affirmative duty to protect **does not arise from its “knowledge of an individual’s predicament,”** or **“its expressions of intent to help;” it arises only where the State limits an individual’s “freedom to act on his own behalf.”** *Id.* (holding that the state must restrain an individual’s ability to act through “incarceration, institutionalization, or other similar restraint of personal liberty.”).

Sixteen years later, the Supreme Court reiterated *DeShaney’s* holding in *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 755 (2005). In *Castle Rock*, the Court addressed whether a state can create a procedural due process right to protection, a question the Court acknowledged it left unanswered in *Deshaney*. 545 U.S. at 755.

In explaining why it went unanswered, the Court wrote that their holding in *Deshaney* was "that the so-called 'substantive' component of the Due Process Clause does not 'requir[e] the State to protect the life, liberty, and property of its citizens against invasion by private actors.'" *Id.* (quoting *Deshaney*, 489 U.S. at 195. The Court answered the previously unanswered question in the negative and instructed that "[t]his result reflects our continuing reluctance to treat the Fourteenth Amendment **as a font of tort law**." *Id.* at 768 (cleaned up) (emphasis added). In its final note, the majority wrote:

> Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871, 17 Stat. 13 (the original source of § 1983), did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law.

Id. at 768-69.

The logic and holding of these two opinions should underwire all of this Circuit's interpretations of the substantive components of due process. Based only on these holdings, the District Court correctly concluded that Plaintiff was stretching the doctrine beyond its limits, and that any other ruling would turn these general rule on its head.

2. This Circuit has distorted the doctrine in recognizing the state created danger doctrine and the possibility of a private aid subset of it.

A review of this Circuit's history with the doctrine further supports

Defendants arguments by providing context to the doctrine, as well as pinpointing exactly where this Circuit turned against itself and the Supreme Court.

This Circuit's application of *Deshaney* began innocently enough in *Nobles v. Brown*, 985 F.2d 235, 237 (6th Cir. 1992) (holding that Fourteenth Amendment did not guarantee prison guards protection from prisoners), but grew to consider and develop a cause of action in *Walton v. City of Southfield*, 995 F.2d 1331, 1337 (6th Cir. 1993) (finding one application of the doctrine not clearly established), and *Foy v. City of Berea*, 58 F.3d 227, 231 (6th Cir. 1995) (holding that police did not restrain an individual's ability to care for himself where they ordered an intoxicated person to get in a car and leave), to its outright adoption in *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997), *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998) (defining state-created danger theory), and *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998).

Today, this Circuit recognizes a version of both the custody exception and the state-created danger doctrine, which is at issue in this case. Under the custody exception,[6] the state has a general duty to provide for an individual's basic needs when in custody, i.e., the food, shelter, clothing, and safety mentioned in *Deshaney*. *Lipman v. Budish*, 974 F.3d 726, 741–42 (6th Cir. 2020). The custody exception

[6] The custody exception is improperly characterized as a *Deshaney* exception, where it is otherwise just an extension of the existing Fourteenth Amendment *Estelle-Youngberg* line of cases.

does not apply when an individual is merely released into a world with the same risks she faced before she entered the state's custody. *Id.* at 743. *Deshaney* is the oft referenced example of the custody exception because the plaintiffs in *Deshaney* conceded that Joshua's injuries occurred when he was not in the state's custody, thus this exception did not apply. *Id.*

The state-created danger doctrine is a true creation based on *Deshaney*. *Lipman*, 974 F.3d at 743. Under the state-created danger doctrine, a plaintiff must satisfy three elements:

> 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party;
>
> 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and
>
> 3) the state knew or should have known that its actions specifically endangered the plaintiff.

Id. at 744 (citing *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003).

Within this Circuit, these two exceptions have been applied, and routinely rejected, in cases involving claims against emergency medical responders who allegedly failed to provide adequate medical care. This Circuit has addressed this point in three cases with very similar allegations to those asserted here, *Jackson* and *Willis* each of these opinions demonstrates why dismissal of Plaintiff's claim below

was appropriate. *See also Baker v. City of Detroit*, 217 F. App'x 491, 494 (6th Cir. 2007). The lower court's discussion in *Gooden* also exemplifies this Court's prior applicable reasoning. These cases are discussed in turn below.

i. *Jackson v. Schultz* – Emergency responders have no affirmative constitutional duty to provide aid and private rescue attempts are required under the state created danger doctrine

In *Jackson*, the complaint provided the basis for dismissal and contained the following allegations. *Jackson*, 429 F.3d at 588-89. The decedent suffered a gunshot wound in a bar and EMTs were dispatched to respond by the Detroit Fire Department. *Id.* at 588. The decedent was alive but bleeding profusely when the EMTs arrived and placed him in their ambulance. *Id.* The EMTs did not provide any life support or transport, despite department policy requiring the transport. *Id.* The decedent died in the ambulance. *Id.* The plaintiff sued the EMTS on two theories of liability: that they violated the decedent's right to substantive due process when they did not provide any medical care; and that *Deshaney* triggered a right to adequate medical care because the decedent was in state custody and in a situation of state created danger. *Id.* at 589.

The *Jackson* court quickly dismissed the first theory, writing only that "[i]t is not a constitutional violation for a state actor to render incompetent medical assistance or fail to rescue those in need." *Id.* at 590 (*citing Deshaney*, 489 U.S. at

196). The court then recognized that *Deshaney* presented the only exceptions to that rule but found that neither of *Deshaney's* two exceptions applied. *Id.*

Deshaney's in-custody exception did not apply because it imposed a duty to provide medical care only when the state had "restrain[ed] the ability of an individual to act on his own behalf," like prisoners, the involuntarily committed, foster children, and pre-trial detainees. *Id.* The decedent was not in custody even though he had been moved to an ambulance because the EMTs did nothing to restrain the unconscious decedent. *Id.* at 590-91. "[The] Decedent's liberty was 'constrained' by his incapacity, and his incapacity was in no way caused by the defendants." *Id.* at 591.

Likewise, *Deshaney's* state-created danger theory was rejected. *Id.*. This theory required the plaintiff to plead:

> (1) an affirmative act by the EMTs that creates or increases a risk that the decedent would be exposed to 'private acts of violence,'
>
> (2) a special danger to the decedent such that the EMTs' acts placed the decedent specifically at risk, as distinguished from a risk that affects the public at large, and
>
> (3) that the EMTs knew or should have known that their actions specifically endangered the decedent.

Id. The court deduced that plaintiff's theory was based on two different ideas: that the EMTs moved the decedent to a more dangerous area (the back of the ambulance), or that the decedent was moved to a place where it was less likely other people would render aid. *Id.*

The *Jackson* court suggested that the only possible claim the plaintiff could have pled was that the EMTs cut off "private sources of rescue without providing an adequate alternative." *Id.* This was based on dictum in *Beck v. Haik*, 377 F.3d 624, 643 (6th Cir. 2004) that suggested a constitutional claim may lie where "police threatened to arrest private search and rescue divers at the scene of a drowning, and then failed to provide adequate state divers." *Id.* The Sixth Circuit held that such a claim was not satisfied in *Jackson* because there were no allegations the EMTs did anything more than place the decedent in the back of the ambulance; they did not discourage others from entering the ambulance; there were no allegations that private rescue was available or attempted; nor were there any facts showed "the EMTs interfered with private aid." *Id.* at 592.

ii. *Willis v. Charter Twp. of Emmett* – Private acts of violence requires violence and private sources of aid must be offered

In *Willis v. Charter Twp. of Emmett*, 360 F. App'x 596 (6th Cir. 2010), a firefighter arriving at the scene of a car accident incorrectly assessed that one injured party was dead. The defendant repeatedly conveyed that information to others who could have provided aid, at one point even directing others not to go over the man's truck because he was deceased. *Willis*, 360 F. App'x at 598. A second firefighter also incorrectly assessed the man as dead and told others that information. *Id.* The District Court held that the man's estate could not satisfy either *Deshaney* exception and this Circuit affirmed. *Id.*

In affirming the dismissal, this Circuit rejected the argument that private acts of violence are not required or can be satisfied through other actions. The Court reaffirmed its *Jackson* holding, writing, "Specifically [in *Jackson*], we rejected the argument that moving the decedent to a location where it was less likely that he would receive aid constituted exposing him to private acts of violence." *Id.* at 601. The *Willis* Court held that "the extended period of time during which [the decedent] was left untreated and the jostling of the cab of his pickup when it was secured for towing" did not satisfy the private acts of violence requirement. *Id.* at 601.

The Court also recognized that the plaintiff's claim that the defendants cut off private sources of aid was merely the plaintiffs' attempts to "recharacterize" their claim that the defendants should have provided better rescue services. *Id.* at 603. There were no actual allegations that private aid was prevented or even offered. *Id.*

iii. *Gooden v. Batz* – Indirectly preventing aid is insufficient

Gooden, like all cases on this issue, contains a tragic factual premise that required an emergency medical response. *Gooden v. Batz*, No. 3:18-CV-00302, 2020 WL 6146395 (S.D. Ohio Oct. 20, 2020), Report and Recommendation adopted by No. 3:18-CV-302, 2021 WL 2389727 (S.D. Ohio June 10, 2021). Plaintiff Gooden was involved in a motor vehicle accident wherein his vehicle "collided" with a tractor-trailer. *Id.* at *1. Defendant Batz, a paramedic, responded to the scene and found Gooden unconscious. *Id.* at *2. Plaintiff alleged that "Batz incompetently and

wrongfully checked—both visually and manually—Mr. Gooden for a pulse and respiration 'neither of which Batz wrongfully claimed were present.'" *Id.* at *2. Batz then conveyed his findings to others who could have helped Gooden. *Id.* Two other paramedics also checked Gooden for signs of life but reported finding none, so a sheet was placed over Gooden. *Id.* Plaintiff alleged that the paramedics violated protocol by not transporting Gooden to a hospital immediately. *Id.* More than an hour later, Batz noticed Gooden move; he checked him for a pulse and, upon finding a faint pulse, provided care and transported him to the hospital. *Id.*

In the subsequent lawsuit, Gooden alleged that his Fourth, Eighth, and Fourteenth Amendment rights were violated because:

> he had a right to receive medical treatment at the scene without being placed into increased danger from other persons including EMTs Batz, Gallup, and Miller.... Defendants failed to provide appropriate medical care, or indeed any medical care, for over an hour after arriving at the accident scene, and proximately resulting from Defendants' false statements, reports and records.

Id. at *4. The Magistrate Judge issued a Report and Recommendation first, and Defendants will discuss only the court's dismissal of Gooden's Fourteenth Amendment claim.

Gooden had rejected this Circuit's previous holding that generally it is not constitutional violation when "a state actor to render[s] incompetent medical advice or fail to rescue those in need." *Id.* at *5. (quoting *Peete v. Metropolitan Gov't of Nashville and Davidson Cnty.*, 486 F.3d 217, 223 (6th Cir. 2007) (internal citations

omitted)). The Report held that Gooden was wrong because only the custody exception and state-created danger theory obligate a state actor "to aid or protect an individual from further danger." *Id.* The Court went on to explain why Gooden's pleadings did not satisfy either standard. *Id.*

Relevant to this matter is the Report's rejection of Gooden's state-created danger claim. The Report found that nothing about Batz' actions exposed Gooden to private acts of violence. *Id.* Gooden argued that he satisfied the doctrine because Batz' prevented other people from assisting him which, in turn, placed him in great danger. *Id.* This theory was also based the *Beck* private aid interpretation. *Id.* The District Court explained that even if those cases provided a constitutional basis, the factual record could not support such a claim because Batz had never told anyone not to provide aid or tried to stop anyone from providing aid. *Id.* The fact that his actions led others not to render aid indirectly was not sufficient. *Id.*

When the District Court adopted the Magistrate Judge's Report and Recommendation, the Court discussed how Batz was alleged to have "recklessly, wantonly, willfully, incompetently, and wrongfully" assessed the decedent, how he "wrongfully claimed" Gooden was deceased, and how Batz made "false statements." *Gooden v. Batz*, No. 3:18-CV-302, 2021 WL 2389727, at *2 (S.D. Ohio June 10, 2021). Gooden made similar allegations of reckless, willful, wrongful, and false statements of another defendant. *Id*. Gooden alleged the placement of a sheet over

him and directions from the defendants that he was dead and did not need aid, prevented him from receiving further treatment and other rescue that he was entitled to receive. *Id.* The District Court explained that such allegations were insufficient under both the state-created danger doctrine and private aid theory. *Id*. at *4-8.

The District Court held that Gooden had failed to satisfy three portions of the doctrine. *Id*. at *7. First, there were no factual allegations that private aid had been cut off. *Id*. Second, there were no allegations that any attempt to rescue the decedent had been prevented by the defendants. *Id*. And, third, there were no allegations to support that the defendants "knowingly created or increased a risk that Gooden would be exposed to private acts of violence." *Id*. Thus, there were no facts that could satisfy the basic requirements of the doctrine. *Id.*

In rejecting the private aid theory, the District Court distinguished its case from three other cases wherein it was *suggested* that such a claim could exist. *Id.* at *7. In two cases, *Thompson* and *Beck*, private aid was actually offered and directly prevented. *Id*. While in one, *Shoup*, the plaintiff was in police custody. *Id*. The Magistrate Judge had previously held that the fact that a defendant's actions may have indirectly led others not to render aid was insufficient because not only were there no allegations that private aid was offered, but no allegations that it was physically prevented anyone from providing aid. *Gooden v. Batz*, No. 3:18-CV-00302, 2020 WL 6146395, at *8 (S.D. Ohio Oct. 20, 2020) ("Neither their incorrect

report nor the sheet placed over Mr. Gooden (viewed alone or together) prevented others from checking Mr. Gooden's pulse or respiration, or from attempting to help him in another way."). The District Court ruled that such allegations of aid being offered and prevented were required but not made by Gooden, therefore his claims had to be dismissed.

3. The District Court Correctly Held that Plaintiff's Factual Allegations Cannot Satisfy Any Version of DeShaney.

i. Under this Circuit's current Applications of *DeShaney*, Plaintiff failed to satisfy the state created danger and private aid theories.

The District Court correctly concluded that Plaintiff cannot plead a *DeShaney* claim because he cannot satisfy the first, private act of violence, element, nor the private aid theory. Defendant addresses each theory in turn.

Defendants first address the private act of violence element that cannot be satisfied because there are no allegations of violence. Plaintiff argues that the placing of a sheet and premature funeral processing (which truly was just transporting). Plaintiff provides no support for why this act should be considered one of violence. As the District Court correctly noted, these actions are more akin to the tow truck jostling than the violence found in *Nelson v. City of Madison Heights*, 845 F.3d 695, 703 (6th Cir. 2017), where this Court said that the element was satisfied by disclosing an informant's name to a drug dealer's companion, which increased the

risk the informant would be exposed to violent retaliation by the drug dealer. [*Dismissal Opinion*, R. 100, PageID.2684].

Moreover, Defendants also argued below that there are no allegations that there are no allegations to satisfy element two of the state created danger theory: a special danger to the decedent such that the EMTs' acts placed the decedent specifically at risk, as distinguished from a risk that affects the public at large. There are no allegations that would plausibly allege that Beauchamp was any different from any other member of the public that was unresponsive and in need of medical care that she would be affected differently from a lack of care than anyone else. Without this element, Plaintiff also cannot plead a viable theory of liability.

Next, as to the private aid theory, the District Court correctly outlined why affirmative acts of prevention are necessary. [*Dismissal Opinion*, R. 100, PageID.2684-87]. Plaintiff raises several arguments in support of why this holding was wrong. First, that the defendants' statements dissuaded the family from seeking additional aid.[7] Second, that actual aid did not need to be offered because they were led to believe it was unnecessary. The District Court properly rejected these arguments, relying on the reasoning in *Jackson.* [*Dismissal Opinion*, R. 100, PageID.2685-86]. As noted by the District Court, all opinions from this Circuit have

[7] Any suggestion in Plaintiff's Brief that the family actually sought private aid is patently unsupported by the allegations. At most, the family repeatedly asked the Defendants to re-check Beauchamp. Defendants are not a private source of aid.

required that aid be available and/or offered, and actually affirmatively stopped. [*Dismissal Opinion*, R. 100, PageID.2685-86]. Plaintiff acknowledged that this Circuit has never allowed affirmative misrepresentations to constitute a sufficient affirmative act, and relies only on outer circuit district opinions for this proposition.

Third, Plaintiff suggests that Defendants prevented the Southfield Police Officer from providing aid. The logic of this argument is faulty. Not only is the Southfield Police Officer not a private source of aid, but there is not allegation that the officer was actually offering aid. Plaintiff's allegations only state that the family communicated their observations of Beauchamp to the officer, who then flagged Defendants down to pass on the observations. This argument was also never presented to the District Court and should not be considered by this Court. *See Hayward v. Cleveland Clinic Found*., 759 F.3d 601, 614 (6th Cir. 2014) (holding it would not review issue not raised in the district court when party had ample opportunity to raise argument but failed to raise it).

Fourth, Plaintiff argues that the call to Dr. Darr prevented her from providing Beauchamp aid. The call to Dr. Darr was not an offer of a private source of aid. As Plaintiff alleged, the call to Dr. Darr was, per protocol, to terminate resuscitation and was required as part of the Defendants' rescue efforts. Plaintiff even complains that this protocol was not followed. This was part and parcel of the aid being provided.

The call to Dr. Darr was no different than the responders who informed others on the scene that the victim was deceased and did not need treatment.

As such, Plaintiff has failed to demonstrate that a Fourteenth Amendment violation occurred. Defendants are, therefore, entitled to qualified immunity under prong one of the analyses. Plaintiff fairs no better under prong two, as there is no case law that would have notified every reasonable paramedic and EMT that the conduct of the Defendants would violate Beauchamp's constitutional rights under *Deshaney* or any of its progeny. *Ashford v. Raby*, 951 F.3d 798, 801 (6th Cir. 2020). Therefore, this Court should affirm the District Court's grant of immunity.

ii. Alternatively, this Court should reject the judicially-created theories of liability that are unsupported by the 14th Amendment and Deshaney

The *Deshaney* doctrine is grounded in a fallacy: that the Supreme Court "noted—or at least alluded to—two exceptions" to its black and white holding that the Due Process Clause does not offer any guarantees of protection against private violence. *Lipman*, 974 F.3d at 741–42. The Supreme Court has never, and is unlikely to ever, support such an expansion of the Due Process Clause. *Johnson v. City of Philadelphia*, 975 F.3d 394, 398 n.7 (3d Cir. 2020). Yet, "[f]rom those simple words [in *Deshaney*]… sprang a considerable expansion of the law," that is now, after much application, being questioned as it spurns into territory neither the drafters of the 14th Amendment nor the Supreme Court could have imagined and that directly

contradicts the principles of *Deshaney*. *Id.* at 398; *see also Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 188 (4th Cir. 2010 (Wilkinson, J., concurring). Not every court has accepted the *Deshaney* exceptions. *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs*., 597 F.3d 163, 188 (4th Cir. 2010); *Keller v. Fleming*, 952 F.3d 216, 227 (5th Cir. 2020); *Turner v. Thomas*, 930 F.3d 640, 646 (4th Cir. 2019), cert. denied, 140 S. Ct. 905, 205 L. Ed. 2d 461 (2020); *Irish v. Maine*, 849 F.3d 521, 526 (1st Cir. 2017). And even those Circuits, including the Sixth, that have allowed such claims have begun to rethink the foundation of such claims. *Estate of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 491 (6th Cir. 2019); *Johnson*, 975 F.3d at 398.

As highlighted in *Deshaney*, the drafters of 14th Amendment intended it to *limit* governmental intrusion, not encourage it. *DeShaney*, 489 U.S. at 195. It was never intended to protect individuals from the acts of other private individuals. *Id.* at 196. There is no indication the 14th Amendment was intended to create a duty to protect, a traditional facet of tort law. The bounds of tort liability are traditionally left to legislators and/or states. *S.C. Dep't of Soc. Servs.*, 597 F.3d at 184 . None of the Constitution's amendments even created a mechanism to enforce federal rights against state actors; instead, the legislature passed 42 U.S.C. § 1983. Because this doctrine "does not stem from the text of the Constitution or any other positive law"

this Court should exercise caution and consider whether the Supreme Court's controlling precedent of *Deshaney* permits this action. *Johnson*, 975 F.3d at 400.

Moreover, this Circuit's application in cases like *Davis,*143 F.3d 1021 (6th Cir. 1998), and *Stemler*, 126 F.3d 856 (6th Cir. 1997), which conflict with its prior opinions in *Foy,* 58 F.3d 227 (6th Cir. 1995), and *Nobles*, 985 F.2d 235 (6th Cir. 1992), is contrary to the Supreme Court's principle that duties end when custody ends. *Deshaney* did not extend the custody exception to Joshua, because he was not in custody at the time of the injuries. Yet, in both *Davis* and *Stemler*, this Circuit extended the custody exception to individuals who had been released from custody.

This Court should follow the controlling precedent of the Supreme Court and hold, consistent with the drafter's intention, that no violation of Beauchamp's 14th Amendment rights occurred. Under such a finding, the individual Defendants are entitled to qualified immunity and dismissal of the Substantive Due Process claim.

C. Implications for the *Monell* claim – The District Court Correctly Dismissed *Monell* Claim Against the City of Southfield Upon Finding No Violation

The Supreme Court has held that where no constitutional injury has been inflicted by a state actor, any questions of the actor's municipal employer's liability become moot. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (holding that "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of

constitutionally excessive force is quite beside the point.") As explained in the preceding paragraphs, Plaintiff failed plead that any constitutional violation occurred. Thus, no constitutional injury was inflicted based on policies of Southfield. The District Court's dismissal of Southfield was appropriate.

III. THE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE NO CASE HAS EVER IMPOSED LIABILITY UPON ANY PARAMEDICS AND EMTS FOR SIMILAR CONDUCT

It should be obvious that Defendants are entitled to qualified immunity under the second prong of the analysis given the discussion in Section II above. Plaintiff advocates that the *DeShaney* doctrine supports liability in a way this Circuit has never found to be the case. How then could the Defendants have known that their conduct was *constitutionally* impermissible? Plaintiff argues that the recognition of the state created danger doctrine alone provided sufficient notice to the Defendants. But the Supreme Court has always rejected such notions, most recently in *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021), and *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021). In both cases, the Supreme Court addressed the specificity requirement of the clearly established prong and explained that such cases were important to provide notice to the officials. *Id.*

This Court's decision in *Wilson v. Gregory*, 3 F.4th 844 (6th Cir. 2021), is decisive on this issue. *Wilson* involved the assertion of qualified immunity to a claim brought under the state-created danger doctrine. *Wilson*, 23 F.4th at 854. The

Court briefly discussed the proper question to ask in analyzing the state-created danger doctrine, i.e., whether the victim was safer before the state action than after, before quickly pivoting to decide the issue based on the clearly established prong of the qualified immunity analysis. *Id.* at 855-56 It is within that holding that this Court should find the most guidance.

The Court wrote that "[w]hat matters most at this stage of the qualified immunity inquiry is whether the link between the state-created-danger doctrine and fact patterns involving suicide by a person not in official custody was clearly established at the time of the events here." *Id.* at 859. The plaintiffs had argued that the constitutional right at issue was clearly established merely because the requirements of the state-created danger doctrine were clear. *Id.* at 856. The defendants argued the question was more specific, i.e., "whether a police officer can be found liable under the state created danger theory when they respond to a 911 call and the individual ultimately commits suicide." *Id.* The Sixth Circuit said both were too general; framing the question instead as whether by the date of the incident "the law clearly established that it was unconstitutional to take affirmative actions that created or increased the risk of a person's suicide when the person was not in official custody." *Id.*

In reaching its answer to that question, the Court examined prior similar cases involving suicides: *Cutlip*, *Jahn*, *Armijo*, *McQueen*, and *Cartwright*. *Id.* at 857-59.

In *Cutlip*, an unpublished opinion, the Court "expressed some skepticism" about the application of the doctrine in that scenario but applied it anyway and found no liability. *Id.* at 857. In *Jahn*, another unpublished opinion, the Court said the doctrine did not apply. *Id.* In *Armijo*, an out of circuit case discussed in both *Cutlip* and *Jahn*, the doctrine was applied to a suicide case, but the Court also mentioned how other circuits had rejected the same premise. *Id.* In *McQueen*, the doctrine was also inapplicable but under a somewhat different fact pattern. *Id.* at 858. While Cartwright refined the analysis called for by the state-created danger doctrine to ask "not whether the victim was safer during the state action, but whether he was safer before the state action than he was after it." *Id.* (quoting *Cartwright v. City of Marine City*, 336 F.3d 487, 492 (6th Cir. 2003)).

Utilizing its analysis of these cases, the Court then noted that no case had ever extended the doctrine to such a fact pattern, i.e., "suicide by someone not in official custody." *Id.* As liability had never extended to "similar instances" of conduct, the defendants were not on notice that their conduct may have been unconstitutional and they were entitled to qualified immunity under the clearly established analysis. *Id.* 859. The Court stated that because it the issue was not clearly established, it "need not reach the issue of whether any conduct by the Deputies violated Mr. Huelsman's constitutional rights." *Id.*

No case has extended the state-created danger doctrine to a paramedic that

provided poor medical treatment, mispronounced death, misrepresented the medical status of a patient, or any sufficiently similar fact pattern. Plaintiff has pointed to no such case, and Defendants' have repeatedly discussed the cases that demonstrate there is no such liability. Plaintiff here points to broadly to the mere recognition of the state-created danger doctrine as support for its status as clearly established, just like the Wilson plaintiff did. Such level of generality is insufficient and has been rejected by the Supreme Court and Sixth Circuit as seen in Wilson. Therefore, the Defendants were not provided notice that their conduct may have been unconstitutional as of August 23, 2020, and are entitled to qualified immunity.

IV. PLAINTIFF FAILED TO PLEAD SUFFICIENT FACTUAL MATTER TO SUPPORT THE *MONELL* CLAIM

A. Rule 8's Pleading Standard Requires a Plausible Level of Factual Support for Legal Claims

The pleading requirements of Federal Rule of Civil Procedure 8 were famously detailed by the Supreme Court in *Twombly* and *Iqbal*. *Bell Atl. Corp. v. Twombly*, 550 US. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Supreme Court held that Rule 8 "demands more than an unadorned, the-defendant—unlawfully-harmed-me accusation." *Iqbal*, 556 US. at 678. "Naked assertions devoid of factual enhancement" will not suffice under Iqbal; allegations must be supported by "sufficient factual matter." *Id.*

To satisfy Rule 8's pleading requirements, a complaint must do more than merely recite the elements of a cause of action. *Twombly*, 550 U.S. at 555. A complaint must cross the line of possibility and enter the realm of plausibility. As the Supreme Court explained in *Iqbal*:

> To survive a motion to dismiss, 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. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

> Two working principles underlie our decision. . .. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, **we are not bound to accept as true a legal conclusion couched as a factual allegation**). Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, **only a complaint that states a plausible claim for relief survives a motion to dismiss**. 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. But 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 shown — that the pleader is entitled to relief.

Id. at 678-79 (internal citations, quotations, and alterations omitted).

A complaint must be sufficiently supported *without* the aid of discovery. *Id.* at 686. This remains true "even when the information needed to establish a claim . . . is solely within the purview of the defendant or a third party. . .." *New Albany Tractor, Inc. v. Louisville Tractor, Inc*., 650 F.3d 1046, 1051 (6th Cir. 2011). Discovery cannot serve as the means to obtain the facts required in a complaint:

> By foreclosing discovery to obtain [factual] information, the combined effect of Twombly and Iqbal require [the] plaintiff to have greater knowledge . . . of factual details in order to draft a "plausible complaint." . . . ***The plaintiff may not use the discovery process to obtain these facts after filing suit.*** The language of Iqbal, "not entitled to discovery," is binding on the lower federal courts.
>
> * * *
>
> Without discovery, the plaintiff may have no way to find out the facts in the hands of competitors, but *Iqbal* specifically orders courts . . . to refuse to order further discovery.

Id. at 1051, 1053 (emphasis added).

B. There are No Factual Allegations Regarding Southfield's Conduct that Support a *Monell* Claim

The Rule 8 analysis was recently applied to a similar fact pattern in *Gordon v. Bierenga*, No. 18-CV-13834, 2019 WL 2205853, at *2 (E.D. Mich. May 22, 2019). In *Gordon*, the plaintiff sued the City of Royal Oak and one of its police officers for the shooting death of her husband. *Id.* at *1. The City argued that the Complaint, and proposed Amended Complaint, were factually deficient and could not support a *Monell* claim premised on several theories that the City failed to train or supervise its officer. *Id.* at *2. The Court explained the deficiency:

> The Court cannot identify any properly pleaded facts that, when assumed to be true, would state a Monell claim under a failure to train theory, or any other theory. Plaintiff claims that "Defendant Royal Oak, through its policies, procedures, regulations, or customs, or lack thereof" violated his rights. [ ] She then lists thirteen ways in which the City is liable, including "failing to properly train[,] to enact or provide training[,] to adequately monitor[,] to have proper policies[,] to supervise," and, finally, through other "acts and omissions which may be learned through the course of discovery." [ ] **But this is a list of bare legal recitals and conclusions. <u>There are no concrete factual allegations of other instances of excessive, much less lethal force that plead or even support an inference of a pattern of unconstitutional conduct.</u> Neither is there any mention of what, if any, training exists regarding the use of force.** Because the additional allegations are merely conclusory and do not state a claim, permitting leave to amend this claim is futile.

Id. at *3 (emphasis added).

Plaintiff's allegations supporting the *Monell* claim against the City of Southfield are equally deficient. The Amended Complaint asserts that Southfield "failed to train, discipline and supervise Defendants…promulgating and maintaining de facto unconstitutional customs, policies, or practices." [ECF No. 55, PageID.1693, ¶ 81]. The plain vanilla allegations continue on to say that Southfield knew or should have known about its failings but did nothing; the Second Amended Complaint restates these allegations several times using different words to identify different policies. [ECF No. 55, PageID.1693-1695].

Factual allegations are wholly missing though. Just like in *Gordon*, there are no factual allegations about prior instances where inadequate medical care was provided. There are no allegations about what training the Defendants did receive and how it was inadequate. The Second Amended Complaint is completely devoid of factual allegations that would support any of the *Monell* theories – failure to train, supervise, and discipline – of liability. The Complaint contains mere "[n]aked assertions devoid of factual enhancement." *Iqbal*, 556 U.S. at 678. These mere conclusions are not entitled to the assumption of truth. *Id.* at 680. Plaintiffs have merely recited the elements of a *Monell* liability claim, without any factual material to support it. Plaintiff's allegations "are merely consistent with a defendant's liability, [the Second Amended Complaint] stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 US. at 678-79. Thus,

Rule 8 also provides grounds to affirm the District Court's dismissal of the claim against Southfield.

CONCLUSION

Plaintiff has demonstrated no errors in the District Court opinion. The Fourteenth Amendment is not a font of tort law. It does not require state actors to provide rescue or medical care to those outside of the state's custody. The mere fact that state actors were involved does not transform every misstep into an issue of constitutional proportions. Plaintiff's claims here have no foundation in the Fourteenth Amendment and the District Court properly dismissed this case. This Court should affirm.

Respectfully submitted,

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Dated: February 3, 2023

CERTIFICATE OF COMPLIANCE

I certify that Appellee's brief complies with the type-volume limitation in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief contains 10,649 words, excluding the contents exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

I further certify that Appellee's brief complies with the typeface requirement in Rule 32(a)(5) of the Federal Rules of Appellate Procedure. I prepared the brief in Microsoft® Word 365 and used Times New Roman, a proportionally-spaced font, at 14 point.

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Dated: February 3, 2023

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2023, I electronically filed the foregoing brief with the Clerk of the Court, which will send notification to the following: *All Attorneys of Record*.

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Dated: February 3, 2023

APPENDIX

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