No. _____

IN THE

Supreme Court of the United States

MATEUSZ FIJALKOWSKI,

Petitioner,

v.

M. WHEELER, *et al.*

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether the Court should revisit its qualified immunity doctrine, which stands in derogation of over three hundred years of Western political theory and contributes to a culture of American law enforcement that tolerates and facilitates police misconduct.

Parties

The Petitioner is Mateusz Fijalkowski, plaintiff and appellant below. The Respondents are the following officers of the Fairfax County, Virginia Police Department, defendants and appellees below: M. Wheeler, S. Adcock, S. Blakely, R. Bronte-Tinkew, C. Clark, J. Grande, R. Jakowicz, L. Labarca, L. McNaught, W. Mulhern, and M. Zesk.

Prior Proceedings

Fijalkowski v. Wheeler, No. 1:18-cv-492, U.S. District Court for the Eastern District of Virginia. Judgment entered Feb. 2, 2019.

Fijalkowski v. Wheeler, No. 19-1262, U.S. Court of Appeals for the Fourth Circuit. Judgment entered March 9, 2020.

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Petition for Writ of *Certiorari*

Petitioner Mateusz Fijalkowski respectfully petitions this court for a writ of *certiorari* to review the judgment of the Court of Appeals for the Fourth Circuit in this case.

Opinions Below

The opinion of the Fourth Circuit is found at 801 F. App'x 906, and as Appendix A to this petition. The opinion and order of the district court is found at 361 F. Supp. 3d 577 and as Appendix B to this petition.

Jurisdiction

The Fourth Circuit entered judgment on March 9, 2020. This petition is filed in timely fashion under 28 U.S.C. § 1254(1) pursuant to this Court's Order of March 19, 2020.

Constitutional Provision Involved

The Fourteenth Amendment to the United States Constitution provides: "No state shall *** deprive any person of life, liberty, or property, without due process of law...."

Statement of the Case

Petitioner Mateusz Fijalkowski, a Polish student in the United States on a summer job program, experienced a psychotic break while working as an attendant at an apartment building pool in Fairfax, Virginia. He began to act erratically, speaking to himself in Polish, blowing a lifeguard's whistle, walking repeatedly into the pool from the shallow side, mounting the lifeguard's tower and shouting, and on one occasion irrationally grabbing at the colored bracelet assigned to a swimmer at the pool. The pool's lifeguard ordered the pool area emptied of all attendees and called the police. The police recognized that Petitioner was undergoing a mental health crisis. The lifeguard told the police that Petitioner did not know how to swim. After standing quietly by the shallow end of the pool for over one minute, Petitioner entered the pool from the shallow end and walked into the deep end, where he remained submerged for over thirty seconds: the limit that Red Cross training instructs lifeguards to permit persons to stay underwater. The lifeguard and at least one of the officers had received Red Cross training. When Petitioner did not resurface, the lifeguard sought leave of the police to bring him to the surface. Police forbade him from doing so. For over two and a half minutes, during which the officers looked on, chatted, and did nothing, Petitioner remained completely submerged. This was no "split-second" affair; it was a leisurely

drowning. Petitioner visibly released his last breath and vomited under water. Finally, the police allowed the lifeguard to retrieve Petitioner's body. When he was pulled out of the pool, Petitioner had neither breath nor pulse. Cardiopulmonary resuscitation by the police did not revive him, but emergency medical technicians who responded to the scene – climbing over a fence to enter – were able to revive him with a defibrillator. Petitioner spent two weeks in the hospital, first for his drowning and then in the mental health ward, and was brought back to Poland by his father. The complaint filed below, *see* Appendix C, incorporated a surreal video of the events described above taken by a bystander outside the enclosed pool area. It may be viewed by Googling <*Fijalkowski v. Wheeler*> or at https://www.youtube.com/watch?v=Iv5luuG-SWo.

Conceding "it appears that the police defendants may have taken too long" to rescue Petitioner but without reaching the constitutional merits, the district court held that the officers were protected by qualified immunity, as no prior case put them sufficiently on notice that their actions could have violated Petitioner's rights. *See Fijalkowski v. Wheeler*, 361 F. Supp. 3d 577, 591. Only two circuits had considered state-enhanced danger liability in the context of law enforcement officers barring qualified private rescuers from making timely water rescue attempts. Both found that such conduct constituted a violation of the victim's

substantive due process rights. *Beck v. Haik*, 234 F.3d 1267 (6th Cir. 2000) (unpublished); *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990).[1] But while there was unanimity in finding a constitutional violation, the circuits split as to whether the offending officers were nevertheless protected by qualified immunity. The Fourth Circuit followed the Sixth Circuit. Like the district court, the appellate court extended qualified immunity to officers who nonchalantly let a man drown on their watch and prohibited a lifeguard from saving him while he still had breath and pulse.

[1]In *Andrews v. Wilkins,* 934 F.2d 1267 (D.C. Cir. 1991), "rather than using their authority to interfere in a private rescue, the police officers used their authority to solicit it." *Id*. at 1271. In awarding qualified immunity to the officers in *Andrews*, the D.C. Circuit readily distinguished *Ross* – something not noted by either court below.

Reasons for Granting the Writ

The instant petition does not undertake to repeat the myriad historical and doctrinal analyses and arguments set forth fully and ably in the briefs of petitioners and *amici*[2] and articles by academics[3] who, without success to date, have sought to have this Court reconsider its qualified immunity jurisprudence. While

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[2]As this petition was being written, *certiorari* was denied in the following cases challenging qualified immunity: *Zadeh v. Robinson,* 928 F.3d 457 (5th Cir. 2019), *cert. denied*, 2020 WL 3146691 (2020); *Corbitt v. Vickers,* 929 F.3d 1304 (11th Cir. 2019), *cert. denied*, 2020 WL 3146693; *West v. City of Caldwell*, 931 F. 3d 978 (9th Cir. 2019), *cert. denied*, 2020 WL 3146698 (2020); *Mason v. Faul*, 929 F.3d 762 (5th Cir. 2019), *cert. denied*, 2020 WL 3146722 (2020); *Anderson v. City of Minneapolis*, 934 F.3d 876 (8th Cir. 2019), *cert. denied*, 2020 WL 3146690 (2020); *Jessop v. City of Fresno*, 918 F.3d 1031 (9th Cir. 2019), *cert. denied*, 2020 WL 2515813 (2020); *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019), *cert. denied*, 2020 WL 2515455 (2020); *Clarkston v. White*, 943 F.3d 988 (5th Cir. 2019) (per curiam), *cert. denied*, 2020 WL 2515530 (2020); *Baxter v. Bracey,* 751 F. App'x 869 (6th Cir. 2018), *cert. denied*, 2020 WL 3146690 (2020); *Brennan v. Dawson,* 752 F. App'x 276 (6th Cir. 2018), cert. denied, 2020 WL 3146681 (2020).

[3]William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018); Karen M. Blum, *Qualified Immunity: Time to Change the Message,* 93 NOTRE DAME L. REV. 1887 (2018); Samuel L. Bray, Foreward, *The Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 1793 (2018); Alan K. Chen, *The Intractability of Qualified Immunity,* 93 NOTRE DAME L. REV. 1937 (2018); John C. Jeffries, Jr., *What's Wrong With Qualified Immunity,* 62 FLA. L. REV. 851 (2010); Scott Michaelman, *The Branch Best Qualified to Abolish Qualified Immunity*, 93 NOTRE DAME L. REV. 1999 (2018); John F. Preis, *Qualified Immunity and Fault,* 93 NOTRE DAME L. REV. 1969 (2018); Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity,* 93 NOTRE DAME L. REV. 1797 (2018); David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Immunity in Prison,* 93 NOTRE DAME L. REV. 2021 (2018); Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093 (2018).

respectfully incorporating this voluminous scholarship by reference, a different, more fundamental objection to that doctrine is offered here, reflecting the fact that concern with police misconduct has now reached a tipping point in public affairs.[4]

Exercising its prerogatives as a co-equal branch of the federal government, this Court created and has maintained the qualified immunity defense. *See generally* William Baude, *Is Qualified Immunity Unlawful?,* 106 CAL. L. REV. 45 (2018). The defense has routinely been construed to deny victims of abuse – or, in the most troubling cases, their heirs – potentially viable claims for officers' unlawful or unconstitutional actions. *See*, *inter alia,* the cases listed in n.2, *supra.* Several justices of this Court have suggested that it reassess its qualified immunity jurisprudence. *See, e.g., Kisela v. Hughes,* 138 S. Ct. 1148 (2018) (Sotomayor, J., dissenting); *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1872 (2017) (Thomas, J., concurring); *Salazar-Limon v. City of Houston,*137 S.Ct. 1277 (2017) (Sotomayor, J., dissenting). Lower courts have called for such reassessment as well. *See, e.g., Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring); *Thompson v. Clark*, No. 14-cv-7349, 2018 WL 3128975, at *6-12 (E.D.N.Y. June

[4]The issue of immunized police misconduct is not limited to cases of excessive force. Petitioner was denied timely rescue by nonchalant officers possessed of the means to save him before he lost both breath and pulse. While there are far fewer state-enhanced danger drowning cases than excessive force cases, the qualified immunity barrier imposed is the same in both and subject to the same critique.

26, 2018).

Concern with unchecked police misconduct ranges beyond judges, plaintiffs' lawyers, and legal academics. Public commentators and influential publications running the gamut from politically conservative to politically liberal are asking this Court to take stock of the practical consequences of its qualified immunity jurisprudence. *See* George F. Will, *This doctrine has nullified accountability for police. The Supreme Court can rethink it*, WASH. POST (May 13, 2020), https://www.washingtonpost.com/opinions/will-the-supreme-court-rectify-its-qualified-immunity-mistake/2020/05/12/05659d0e-9478-11ea-9f5e-56d8239bf9ad_story.html (last visited June 2, 2020); *see also* Editorial Board, *How the Supreme Court Lets Cops Get Away with Murder*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html (last visited June 2, 2020).

Politicians are also taking notice. In the ongoing absence of correction by the judiciary that created and enforces the doctrine, the Justice in Policing Act of 2020 and the Ending Qualified Immunity Act were introduced in Congress as this petition was being written. *See* Justice in Policing Act, H.R. 7120, 116th Cong. (2020), htps://www.congress.gov/116/bills/hr7120/BILLS-116hr7120ih.pdf; Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020),

https://pressley.house.gov/sites/pressley.house.gov/files/Ending%20Qualified%20Immunity%20Act_0.pdf. The JUSTICE Act is scheduled to be introduced in the Senate shortly. *See* JUSTICE Act, S. ____, 116th Cong. (2020), https://apps.npr.org/documents/document.html?id=6950175-Senate-Republicans-Justice-Act.

Public distrust and unrest in the face of unchecked law enforcement abuse have once again exploded, causing massive civil strife in many cities throughout the country starting in late May 2020. Beginning June 1, 2020, and on a daily basis to date, The Washington Post has devoted numerous pages in its first print section to articles published under the heading "Protests of Police Violence."[5]

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[5]*See also* the following videos, without regard to inflammatory headlines or commentary: *Brooklyn Protests: Video shows NYPD officer shoving woman to ground*, ABC7 NY (May 31, 2020), https://abc7ny.com/brooklyn-protests-video-shows-nypd-officer-shoving-woman-to-ground/6221538/ (last visited June 2, 2020); Andrew Chung et al., *For cops who kill, special Supreme Court protection*, REUTERS (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/ (last visited June 10, 2020); Meagan Day, *In Cities and Towns Across the US This Week, the Brutal Police Riot Has Continued,* JACOBIN (June 4, 2020), https://www.jacobinmag.com/2020/06/police-riot-brutality-george-floyd-protests (last visited June 10, 2020); Flynn et al., *57 Buffalo officers resign from special squad over suspension of two who shoved 75-year-old,* WASH. POST (June 5, 2020), https://www.washingtonpost.com/nation/2020/06/05/buffalo-officers-suspended-shoving-man/ (last visited June 10, 2020); Catherine Kim, *Images of Police Using Violence Against Peaceful Protesters are Going Viral*, VOX (May 31, 2020), https://www.vox.com/2020/5/31/21275994/police-violence-peaceful-protesters-images (last visited June 2, 2020); Daniel Politi, *Activists Create Public Online Spreasheet of Police Violence Videos*, SLATE (June 6, 2020), https://slate.com/news-and-politics/2020/06/george-floyd-public-spreadsheet-

Qualified immunity did not cause such law enforcement abuses – but in immunizing most of them, it facilitated all of them.

Lower courts "do not have the authority to abrogate or ignore a judicially-created doctrine sanctioned by the Supreme Court absent a constitutional impediment, which is not present here." *Fijalkowski v. Wheeler,* 361 F. Supp. 3d at 586. Judges thus continue, of necessity, to contend with the qualified immunity defense, and judicial distress is palpable:

> Although we recognize that our police officers are often asked to make split-second decisions, we expect them to do so with respect for the dignity and worth of black lives. Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop.

Estate of Jones v. City of Martinsburg, No. 18-2142, 2020 WL 3067925, at *9 (4th Cir. June 9, 2020). It is not only the abuse of persons that has to stop. It is, as well, the judicial immunization of apparent abusers, as occurred in the *Jones* case, where a United States district judge granted qualified immunity to police officers

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police-violence-videos.html (last visited June 10, 2020); Frances Robins, *A Reporter's Cry on Live TV: 'I'm Getting Shot! I'm Getting Shot!'*, N.Y. TIMES (May 30, 2020), https://www.nytimes.com/2020/05/30/us/minneapolis-protests-press.html (last visited June 2, 2020). For a larger and continually updated list of videos, *see* T. Greg Doucette, *George Floyd Protest - Police Brutality Videos on Twitter*, https://docs.google.com/spreadsheets/u/1/d/1YmZeSxpz52qT-10tkCjWOwOGkQqle7Wd1P7ZM1wMW0E/htmlview?usp=sharing&pru=AAABcqjCuj8*yv5tflnwc8mC7K66rH-f6g&urp=gmail_link (last visited June 11, 2020).

who, twenty-two times, shot "an incapacitated, injured person who was not moving and who was laying (*sic*) on his knife." *Id.* at *7. This Court can only indirectly make the police "stop." But it can certainly permit the judiciary do so, as the qualified immunity doctrine is uniquely its creation. *See* James A. Wynn, Jr., *As a judge, I have to follow the Supreme Court. It should fix this mistake,* WASH. POST (June 12, 2020), https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake/ (last visited June 17, 2020).[6]

From its elaboration in *Graham v. Connor* to the present, this Court has routinely affirmed that the authority conferred on law enforcement officers to make arrests creates a right to use force when appropriate. 490 U.S. 386, 396 (1989). "Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id.* This formula has been repeated, often verbatim, in decisions upholding qualified immunity in cases presenting claims of police abuse.[7] This so-called "right" of officers to use force

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[6]Judge Wynn is only the latest federal judge to have gone public with criticism of the qualified immunity doctrine. *See* Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights,* AMER. CONST. SOC. EXPERT FORUM (Jan. 12, 2018) https://acslaw.org/expertforum/the-supreme-courts-quiet-assault-on-civil-rights/ (last visited June 17, 2020).

[7]*Saucier v. Katz*, 533 U.S. 194, 208 (2001); *Anderson ex rel. MA v. Vazquez*, 2020 WL 2175977, at *2 (11th Cir. May 6, 2020); *Cugini v. City of New York*, 941

against citizens has been shielded by the doctrine of qualified immunity even when the officer's conduct is found or assumed to have been unconstitutional or unlawful under federal law – a prerequisite for a finding of qualified immunity. But there exists no "right" to engage in unlawful or unconstitutional action, and courts should not immunize one who does. The qualified immunity analysis created by this Court improperly flips over three hundred years of Western political philosophy on its head.

Pursuant to modern Western democratic theory, neither the state, nor its officers acting in their official capacity, have "rights." It is "We the People" who have rights. We have given government officials *power* to act to our intended collective benefit*, within the limits of the authority expressly granted them*. These principles, emphasizing the distinction between "rights" and "power," and reflecting the then-revolutionary political theories[8] of Thomas Hobbes in *Leviathan*

F.3d 604, 612 (2d Cir. 2019); *Phillips v. Blair*, 786 F. App'x 519, 529 (6th Cir. 2019); *Tatum v. Robinson*, 858 F.3d 544, 549-50 (8th Cir. 2017); *Zimmerman v. Cutler*, 657 F. App'x 340, 347 (5th Cir. 2016); *Thomas v. Dillard*, 818 F.3d 864, 889 (9th Cir. 2016); *Huntley v. City of Owasso*, 497 F. App'x 826, 830 (10th Cir. 2012). Officials may be shielded by qualified immunity even if their conduct violates a state statutory or administrative provision. *Davis v. Scherer*, 468 U.S. 183, 194 (1984).

[8]*Cf.* Sir Robert Filmer*, PATRIARCHA*, OR THE NATURAL POWER OF KINGS (1680), a sustained defense of divine right monarchy.

(1651) and, especially, John Locke in his *Second Treatise of Government* (1690),[9] were embraced by Alexander Hamilton, James Madison, and John Jay in *The Federalist Papers* (1787-88),[10] and adopted by Thomas Jefferson in the

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[9]"If man in the state of nature so be free, as has been said, if he be absolute lord of his own person and possessions, equal to the greatest, and subject to nobody, why will he part with his freedom? [W]hy will he give up his empire and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of nature he has such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasions of others.... This makes him willing to quit a condition which, however free, is full of fears and continual dangers. *** The [] power of doing whatsoever he thought fit for the preservation of himself, and the rest of mankind, he gives to be regulated by laws made up by the society, so far forth as the preservation of himself and the rest of that society shall require; which laws of the society in many things confine the liberty he had by the law of nature." §§123, 129.

[10]The Federalist Papers speak of "rights" only with reference to "the people." With reference to governments, they speak of "power." *E.g., The Federalist* No. 2 (John Jay) ("[W]henever and however it is instituted, the people must cede to [government] some of their natural *rights* in order to vest it with requisite *powers*.") (emphasis added); No. 23 (Alexander Hamilton) ("[G]overnment ought to be clothed with all the *powers* requisite to complete execution of its *trust*.") (emphasis added); "[Government is] to be trusted with all the powers which a free people *ought to delegate to any government*.") (emphasis in original); No. 28 (Alexander Hamilton) ("If [the people's] *rights* are invaded by either [the federal or state government], they can make use of the other as an instrument of redress.") (emphasis added); No. 37 (James Madison) ("The genius of republican *liberty* [demands ...] that all *power* should be derived from the people....") (emphasis added); No. 41 (James Madison) ("T[he] Constitution proposed by the convention may be considered under two general points of view. The first relates to the sum or quantity of *power* which it vests in the government, including the restraint on the States.") (emphasis added); No. 44 (James Madison) ("We have now reviewed, in detail, all the articles composing the sum or quantity of *power* delegated by the proposed Constitution to the federal government....") (emphasis added); No. 51 (James Madison) ("In the compound republic of America, the *power surrendered*

Declaration of Independence (1776),[11] by the Constitutional Convention of 1787,[12] and in the Bill of Rights (1791).[13] State actors must be demonstrably possessed of delegated authority to act in an actually or potentially harmful manner. They cannot claim a right to do so *because they discern no reason not to*. A court-created jurisprudence that permits law enforcement officers to act in an unlawful manner with impunity on the ground that it was *not clearly established that they could not do so*, stands in stark derogation of the political tradition giving rise to this nation. It has the relationship between the people's rights and the government's authority exactly backwards.

It is a matter for reflection that one of the defenses offered by war criminals

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by the people is first divided between two distinct governments.... Hence a double security arises to the *rights of the people*. The different governments will control each other, at the same time as each will be controlled by itself.") (emphasis added).

[11]"We hold these truths to be self-evident, that all men ... are endowed by their Creator with certain inalienable *rights*, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these *rights*, Governments are instituted among Men, deriving their just *powers* from the consent of the governed." (emphasis added).

[12]*See* U.S. CONST. art. I, § 8; art. II, § 3; art. III, § 1.

[13]U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.")

at the Nuremberg Tribunal was *they had no reason to know that they lacked the right to act as they acted*. Here is one defense counsel:

> [A] man of Loerner's education and career *could not know more than leading statesmen who made treaties with Hitler*. *** [A] man like Loerner *had no possibility to recognize that according to International Law, objections of all kinds could have been raised* against the Annexation [of Polish territory] announced by Hitler and the corresponding measures he had taken. *** To him, the accrual of the possessions there was a necessity of war.[14]

This defense, stunningly repudiated by Justice Jackson in his closing argument for the prosecution,[15] was rejected at Nuremburg. A similar defense should not be permitted by this Court to immunize law enforcement officers who violate civil rights.

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[14]Dr. Carl Haensel, Closing Argument for the Defense of Georg Loerner, (*U.S.A. v. Pohl et al.*), NMT Case 4, at 59, 62 (emphasis added), HARVARD LAW SCHOOL LIBRARY NUREMBERG TRIALS PROJECT, http://nuremberg.law.harvard.edu/documents/4750-closing-argument-for-thedefense?q=issue:%22Freezing+experiments%22#p. Loerner provided German concentration camps with supplies. His death sentence was commuted to life imprisonment and then to fifteen years imprisonment. *See generally* NMT Case 4, HARVARD LAW SCHOOL LIBRARY NUREMBERG TRIALS PROJECT, https://nuremberg.law.harvard.edu/nmt_4_intro (last visited June 12, 2020).

[15]See Robert H. Jackson, Closing Arguments for Conviction of Nazi War Criminals, ROBERT H. JACKSON CENTER, https://www.roberthjackson.org/wpcontent/uploads/2015/01/Closing_Argument_for_Conviction_of_Nazi_War_Crimin als.pdf (last visited June 12, 2020).

Petitioner submits this petition in the hope that this Court's consideration of the legal and political theories animating the founding of this country, amplifying the well-made legal arguments of record in prior and current petitions, and in light of the ongoing baleful but foreseeable consequences of its qualified immunity jurisprudence, may lead the Court to re-examining this jurisprudence. The instant case, with its surreal video, offers an opportunity for articulation of a clarified jurisprudence on these issues. Petitioner respectfully submits that the decision whether to excuse the officers for preventing Petitioner's timely rescue should be left to a jury, not be preempted by a court pursuant to the doctrine of qualified immunity.

Conclusion

For these reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

MATEUSZ FIJALKOWSKI,

By counsel

Dated: June 18, 2020

Counsel for Petitioner:

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1262

MATEUSZ FIJALKOWSKI,

Plaintiff − Appellant,

v.

M. WHEELER; S. ADCOCK; S. BLAKELY; R. BRONTE-TINKEW; C. CLARK; J. GRANDE; R. JAKOWICZ; L. LABARCA; L. MCNAUGHT; W. MULHERN; M. ZESK,

Defendants – Appellees,

and

AMERICAN POOL INC.; SEAN BROOKS,

Defendants.

WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS; THE RUTHERFORD INSTITUTE,

Amici Supporting Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T. S. Ellis, III, Senior District Judge. (1:18-cv-00492-TSE-MSN)

Argued: November 13, 2019 Decided: March 9, 2020

Before MOTZ, DIAZ, and HARRIS, Circuit Judges.

Affirmed by unpublished opinion. Judge Diaz wrote the opinion, in which Judge Motz and Judge Harris joined.

ARGUED: Victor M. Glasberg, VICTOR M. GLASBERG & ASSOCIATES, Alexandria, Virginia, for Appellant. Kimberly Pace Baucom, FAIRFAX COUNTY ATTORNEY'S OFFICE, Fairfax, Virginia, for Appellees. **ON BRIEF:** Bernadette E. Valdellon, VICTOR M. GLASBERG & ASSOCIATES, Alexandria, Virginia, for Appellant. Karen Gibbons, Elizabeth Teare, FAIRFAX COUNTY ATTORNEY'S OFFICE, Fairfax, Virginia, for Appellees. Jonathan Smith, Hannah Lieberman, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS & URBAN AFFAIRS, Washington, D.C.; Carter G. Phillips, Mark P. Guerrera, David E. Kronenberg, Justin A. Benson, Joshua Moore, SIDLEY AUSTIN LLP, Washington, D.C. for Amicus Washington Lawyers' Committee for Civil Rights and Urban Affairs. John W. Whitehead, Douglas R. McKusick, THE RUTHERFORD INSTITUTE, Charlottesville, Virginia, for Amicus The Rutherford Institute.

Unpublished opinions are not binding precedent in this circuit.

DIAZ, Circuit Judge:

Mateusz Fijalkowski brought this action under 42 U.S.C. § 1983 and state law, arguing, as relevant here, that Fairfax County, Virginia police officers violated his Fourteenth Amendment substantive due process rights when they delayed—for up to two-and-a-half minutes—a lifeguard from rescuing him from drowning in a swimming pool. He also alleges that the officers were grossly negligent under Virginia law when they delayed his rescue and otherwise failed to assist him. The district court dismissed these claims, concluding that the officers were entitled to qualified immunity on the substantive due process claim and that Fijalkowski failed to state a gross negligence claim. For the reasons that follow, we affirm.

I.

On May 23, 2016, twenty-three-year-old Mateusz Fijalkowski arrived in the United States from his home country, Poland, to work for the summer.[1] Three days later, Fijalkowski began working as a pool attendant at Riverside Apartments in Fairfax County, Virginia. He was trained to clean the pool, check the pH level of the water, and arrange

[1] Because this case comes to us on appeal from the grant of a motion to dismiss, we accept the facts alleged in the complaint as true and draw all reasonable inferences in Fijalkowski's favor. *See Hamilton v. Pallozzi*, 848 F.3d 614, 620 (4th Cir. 2017).

the deck chairs. He wasn't trained to perform lifeguarding duties, and he didn't know how to swim.

On May 30, 2016, Fijalkowski began acting irrationally at work. He argued with guests over the colored wristbands required to enter the pool area, and he grabbed a young woman by the arm and ripped off her wristband. He also began talking to himself in Polish and walking around the pool without purpose, appearing distressed.

A lifeguard on duty that day, Sean Brooks, called the police, and Fairfax County police officers arrived shortly thereafter. Brooks told the officers about Fijalkowski's behavior and that he appeared to be experiencing a mental health crisis. Brooks also told them that Fijalkowski couldn't swim. The complaint further alleges that the officers "were aware that [Fijalkowski] was a supposed lifeguard who did not know how to swim and who was experiencing a serious mental health breakdown, making himself a potential risk of harm to himself and others at the pool." J.A. 12.

The officers attempted to communicate with Fijalkowski, but he blew his whistle and continually moved away from them. The officers directed all pool patrons to leave and locked the fence that surrounded the pool. Only Fijalkowski, Brooks, and the officers remained inside the fenced-in pool area. The officers called a Polish-speaking officer and Fijalkowski's Polish roommate to the pool to attempt to communicate with him. One of the officers was trained in crisis intervention, but he and the others were unable to communicate with Fijalkowski, who didn't acknowledge them.

Fijalkowski continued to act erratically. He paced around the pool and talked to himself. He threw his cell phone into the deep end of the pool and walked in to recover it,

submerging himself in the process. He soon emerged from the pool, but he then threw his cell phone into the deep end a second time. Again, he walked into the pool to recover it, submerged himself, and then emerged. He also climbed into a lifeguard tower and shouted and blew his whistle. The officers continued to attempt to communicate with him, but he didn't respond.

Fijalkowski then went to the ladder at the shallow end of the pool and stood calmly and silently for about one minute.[2] He entered the pool again, going to the deep end and submerging himself. Brooks and the officers stood around the pool and watched him. After some period of time, Fijalkowski grabbed onto the pool's drain cover and struggled not to surface. He vomited, and after about a minute and twenty-two seconds, he released the air retained in his lungs. Eventually, he stopped moving. Brooks and the officers continued to watch him, though they knew that he was at risk of drowning after he had been submerged for thirty seconds and had released the air from his lungs.

At some point, Brooks told the officers that he needed to rescue Fijalkowski. Brooks was able and equipped to do so, but the officers ordered Brooks not to enter the pool. After Fijalkowski had been submerged for approximately two-and-a-half minutes, Brooks again told the officers that he needed to rescue him, and (this time) the officers allowed him to do so. Brooks dove into the pool and brought Fijalkowski to the surface. Several of the officers jumped in to help remove him from the water.

[2] At this time, a bystander began videotaping the incident. The contents of the video are incorporated into the complaint by reference, so we consider them here. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011).

Once Fijalkowski was out of the pool, the officers performed lifesaving measures. Emergency medical technicians arrived and used a ladder to climb over the locked pool fence to reach Fijalkowski. They found that he wasn't breathing and didn't have a pulse. They applied an automatic external defibrillator to his chest. This revived him, and he was transported to the hospital.

Fijalkowski remained in the hospital's heart and vascular unit for just over a week. He was then transferred to the psychiatric unit, where he was diagnosed with bipolar disorder and psychosis. He was discharged from the hospital six days later and returned to Poland.

Fijalkowski filed suit against the officers, Brooks, and Brooks's employer, seeking damages under 42 U.S.C. § 1983 and state law. As relevant here, Fijalkowski alleges that the officers violated his Fourteenth Amendment substantive due process rights when they delayed Brooks's rescue efforts and that they were grossly negligent under Virginia law when they delayed his rescue and otherwise failed to assist him.[3] The defendants moved to dismiss the complaint, and the district court granted the motion, concluding, in relevant part, that the officers were entitled to qualified immunity and that Fijalkowski failed to state a claim of gross negligence. This appeal followed.

[3] Fijalkowski also alleges that the officers violated his substantive due process rights when they failed to prevent him from entering the pool. The district court dismissed this allegation for failure to state a claim. The court also dismissed Fijalkowski's claims against Brooks and Brooks's employer. Fijalkowski does not appeal these rulings.

II.

We first consider the district court's dismissal of Fijalkowski's substantive due process claim on the ground that the officers were entitled to qualified immunity. "We review a qualified immunity-based motion to dismiss de novo." *Tobey v. Jones*, 706 F.3d 379, 385 (4th Cir. 2013).

A.

Qualified immunity shields state officials from civil liability under § 1983 "unless their actions violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pinder v. Johnson*, 54 F.3d 1169, 1173 (4th Cir. 1995) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Determining whether a state officer is entitled to qualified immunity is a two-step inquiry." *Bailey v. Kennedy*, 349 F.3d 731, 739 (4th Cir. 2003). First, we consider "whether a constitutional right would have been violated on the facts alleged." *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 200 (2001)). Second, "assuming that the violation of the right is established," we "consider whether the right was clearly established at the time such that it would be clear to an objectively reasonable officer that his conduct violated that right." *Id.* (quoting *Brown v. Gilmore*, 278 F.3d 362, 367 (4th Cir. 2002)). We may consider the steps in either order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

To determine whether a right was clearly established, we consider whether controlling authority, or a "robust consensus of persuasive authority," *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 544 (4th Cir. 2017) (internal quotation marks omitted), would have given the officers "'fair warning that their conduct,' under the circumstances, 'was

wrongful,'" *Williams v. Strickland*, 917 F.3d 763, 769 (4th Cir. 2019) (internal quotation marks omitted) (quoting *Williamson v. Stirling*, 912 F.3d 154, 187 (4th Cir. 2018)). We must define the right allegedly violated "at a high level of particularity." *Braun v. Maynard*, 652 F.3d 557, 562 (4th Cir. 2011) (quoting *Campbell v. Galloway*, 483 F.3d 258, 271 (4th Cir. 2007)).

Although this standard "do[es] not require a case directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). However, "when 'the defendants' conduct is so patently violative of [a] constitutional right that reasonable officials would know without guidance from the courts' that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002) (quoting *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994)).[4]

B.

Fijalkowski contends that the officers violated his substantive due process rights when they ordered Brooks not to enter the pool to rescue him. Fijalkowski relies on the state-created danger doctrine, which holds that state actors are liable under the Due Process Clause when they "created or increased the risk of private danger, and did so directly

[4] To emphasize the point, Fijalkowski directs us to our recent decision in *Ray v. Roane*, 948 F.3d 222 (4th Cir. 2020). We agree with *Ray* that "directly on-point, binding authority" is not required where "the right was clearly established based on general constitutional principles," *id.* at 229 (quoting *Booker*, 855 F.3d at 543), and we apply that principle here.

through affirmative acts, not merely through inaction or omission." *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015). We decline to resolve whether the officers' conduct constitutes a substantive due process violation under the state-created danger doctrine. Rather, we agree with the district court that even if it does, the officers are entitled to qualified immunity because it was not clearly established at the time of the incident that delaying by up to two-and-a-half minutes[5] the rescue of a drowning person who may have posed a danger to others violated that person's substantive due process rights.

The parties have identified no controlling authority placing the constitutionality of the officers' conduct beyond debate, and we agree that there is none. But this doesn't end our inquiry; a "robust consensus of persuasive authority" may also clearly establish the right allegedly violated. *Booker*, 855 F.3d at 544 (internal quotation marks omitted). Fijalkowski offers no such robust consensus. The officers, for their part, point to three cases from our sister circuits addressing alleged substantive due process violations by officers who prevented the rescue of drowning persons. The officers contend that together, these cases fail to provide a consensus, let alone a robust consensus, that would have given them fair warning that their conduct violated Fijalkowski's substantive due process rights. We agree.[6]

[5] It is not clear from the complaint or the video when Brooks first sought to rescue Fijalkowski. If Brooks did so immediately after Fijalkowski entered the water, the officers would have delayed his rescue for a maximum of two-and-a-half minutes.

[6] The officers also highlight three other cases addressing alleged substantive due process violations by officers who interacted with suicidal persons. Appellees' Br. at 24–26. Because these cases neither found violations nor involved the delay of rescue efforts

The first of the factually similar cases is *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990). In *Ross*, a twelve-year-old boy fell into a lake and sank. *Id.* at 1424. Within ten minutes, two lifeguards, two firefighters, and one police officer arrived on the scene to conduct a rescue. *Id.* In addition, two nearby civilians with a boat and scuba diving equipment offered to assist in the rescue. *Id.* Despite these resources, a county deputy sheriff ordered all rescue efforts to stop because, under a county policy, only divers from the city fire department were authorized to rescue someone drowning in the lake. *Id.* at 1424–25. When the civilians offered to attempt the rescue at their own risk, the deputy sheriff threatened to arrest them and positioned his boat to prevent them from entering the water. *Id.* at 1425. Authorized city divers did not arrive until the boy had been underwater for thirty minutes. *Id.* They pulled him from the water, but he later died. *Id.*

Addressing the deputy sheriff's conduct, the Seventh Circuit stated that "a citizen in peril for his life ha[s] a constitutional right that prevent[s] a police officer from cutting off private avenues of lifesaving rescue without providing an alternative." *Id.* at 1432. The court also held that the right was clearly established at the time of the incident. *Id.* The court so held because "a fundamental tenet of [its] constitutional jurisprudence" is that "the state cannot arbitrarily assert its power so as to cut short a person's life." *Id.* at 1433. Applying that principle to the record facts, the court concluded that a reasonable officer in the deputy sheriff's position would have known that he could not arbitrarily use his

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without providing an alternative, we agree with the officers that the cases would not have given them fair warning that their conduct here was unlawful.

authority to prevent private rescue efforts. *Id.* The court explained that "[t]here was simply no rational reason for [the deputy sheriff] to prefer 'authorized' but equally competent rescuers located away from the scene." *Id.*

The next factually similar case is *Andrews v. Wilkins*, 934 F.2d 1267 (D.C. Cir. 1991), *abrogation on other grounds recognized by Atchinson v. District of Columbia*, 73 F.3d 418, 421 (D.C. Cir. 1996). There, Andrews jumped into the Washington Channel as a police officer attempted to arrest him. *Id.* at 1269. Andrews swam across part of the Channel but then turned back towards the shore and began to tire. *Id.* The officer attempted to throw a life ring to Andrews, but it didn't reach him. *Id.* Officers then saw a private boat approaching, and they hailed the boat to assist in rescuing Andrews. *Id.* After reaching Andrews, the boat owner told the officers that she needed to enter the water to rescue him and that she had been trained to do so. *Id.* However, the officers directed her not to enter the water, stating that Andrews was an escaped prisoner and could be dangerous. *Id.* Approximately thirty minutes later, official rescuers arrived and pulled Andrews from the water. *Id.* He was later pronounced dead. *Id.*

The D.C. Circuit recognized that *Ross* "held that police action deliberately or recklessly interfering with ongoing private rescue efforts may establish a constitutional tort." *Id.* at 1270. However, the D.C. Circuit found the facts in *Andrews* "much less troubling than those in *Ross*." *Id.* at 1271. Among other things, the court noted that the officers in *Andrews* "were concerned with Andrews's bizarre behavior." *Id.* In addition, the court concluded that even if the officers violated Andrews's substantive due process rights when they interfered with the private rescue effort, the right was not clearly

established "in a particularized sense." *Id.* (alterations adopted) (quoting *Brogsdale v. Barry*, 926 F.2d 1184, 1191 (D.C. Cir. 1991)). It explained:

> While it should have been clear to the police that they could not "arbitrarily assert their power so as to cut short a person's life," it certainly could not have been clear to them that they were required to refrain from taking any action when a private citizen, drawn into a police rescue operation, was about to expose herself to substantial danger, of which she was not completely aware.

Id. (internal citation omitted and alteration adopted) (quoting *Ross*, 910 F.2d at 1433).

The final factually similar case is *Beck v. Haik*, No. 99-1050, 2000 WL 1597942 (6th Cir. Oct. 17, 2000) (unpublished). In *Beck*, a man jumped or fell from a bridge into a river. *Id.* at *1. City police officers and the city's director of public safety arrived a few minutes later. *Id.* In addition, members of a group of trained civilian divers heard a report of the incident and went to the scene to assist in the rescue. *Id.* The volunteer divers told the public safety director that they were prepared to attempt a rescue. *Id.* However, the public safety director instructed them not to enter the water because, pursuant to a joint city and county policy, only the county dive team was authorized to conduct underwater rescues. *Id.* The county dive team arrived thirty-five minutes after the volunteer divers had offered to attempt a rescue. *Id.* at *2. They pulled the man from the water and attempted to resuscitate him, but he later died. *Id.*

The Sixth Circuit agreed with *Ross* that "official action preventing rescue attempts by a volunteer civilian diver can be arbitrary in a constitutional sense if a state-sponsored alternative is not available when it counts." *Id.* at *4. The court stated that *Ross* "pointed to" the conclusion that the public safety director's conduct was unconstitutional, but it held

that even if it was, he was entitled to qualified immunity because no Supreme Court or Sixth Circuit precedent clearly established that the Sixth Circuit would follow *Ross*. *Id.* at *7.

We agree with the officers that these cases do not amount to a robust consensus of persuasive authority that would have given them fair warning that their conduct violated Fijalkowski's substantive due process rights. Only *Ross* expressly held that an officer violated a drowning person's substantive due process rights by preventing private rescue efforts without providing an alternative. *Beck* merely suggested that the public safety director did so. One case is not a robust consensus of persuasive authority.

Moreover, the facts in *Ross* and *Beck* are distinct from those here in two key respects. First, the officer in *Ross* and the public safety director in *Beck* prevented the private rescue efforts for approximately thirty and thirty-five minutes, respectively. Second, neither the officer in *Ross* nor the public safety director in *Beck* had reason to believe that the drowning persons posed a danger to others. These cases would not have given the officers here fair warning that delaying Fijalkowski's rescue for up to two-and-a-half minutes, knowing that he may pose a danger to others, violated his substantive due process rights.

The circumstances here are closer to those in *Andrews*. There, the officers were concerned with Andrews's bizarre behavior, and, although the private rescuer said she had

rescue training, they believed that he posed a danger to her. And there, the court suggested that the officers' conduct did not rise to the level of that found unconstitutional in *Ross*.[7]

Accordingly, *Ross*, *Beck*, and *Andrews* would not have given the officers fair warning that delaying Fijalkowski's rescue under the circumstances here violated his substantive due process rights.

But this doesn't end our inquiry. Fijalkowski insists that the officers' conduct so patently violated the fundamental principle that "the state cannot arbitrarily assert its power so as to cut short a person's life," *Ross*, 910 F.2d at 1433, that objectively reasonable officers would have known their conduct was unconstitutional even without closely analogous case law. We cannot agree.

Looking to the facts alleged in the complaint, we cannot say that the officers' conduct amounted to a patently arbitrary assertion of power. True, the complaint alleges that the officers knew that Fijalkowski was at risk of drowning after being submerged for thirty seconds and that Brooks was able and equipped to rescue him. But the complaint also alleges that the officers were aware that Fijalkowski's inability to swim and his mental state made him a risk of danger to others. And, they had seen him enter and exit the pool twice before on his own. Unlike in *Ross*, where "[t]here was simply no rational reason" for the officer to prevent the rescue efforts, *id.*, here there were such reasons. And

[7] The officers in *Andrews* were also concerned that the private rescuer didn't know of the danger Andrews may have posed, while here, Brooks knew of Fijalkowski's erratic behavior, mental state, and inability to swim. But, given the similarities that remain, we don't think this difference would have given the officers fair warning that their conduct was unconstitutional.

ultimately, the officers allowed Brooks to rescue Fijalkowski after (at most) two-and-a-half minutes, far less than the amount of time that had elapsed in *Ross*, *Beck*, and *Andrews*.

Accordingly, the complaint doesn't allege conduct that amounts to a patently arbitrary assertion of power to cut short Fijalkowski's life. And this is so, even as we are mindful that at the motion to dismiss stage, we may not draw inferences against Fijalkowski. We are also mindful that the rationale for the officers' conduct isn't alleged in the complaint, and we don't make any inferences about that rationale here. We only conclude that on its face, the complaint alleges facts belying the contention that the officers' conduct was a patently arbitrary assertion of power.

We therefore affirm the district court's dismissal on qualified immunity grounds of Fijalkowski's substantive due process claim.

III.

We next consider the district court's dismissal of Fijalkowski's gross negligence claim. "We review de novo the grant of a motion to dismiss for failure to state a claim." *Bonds v. Leavitt*, 629 F.3d 369, 385 (4th Cir. 2011).

A.

Under Virginia law, gross negligence is "a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person." *Elliott v. Carter*, 791 S.E.2d 730, 732 (Va. 2016) (quoting *Cowan v. Hospice Support Care, Inc.*, 603 S.E.2d 916, 918 (Va. 2004)). "Because 'the standard for gross negligence in Virginia is one of indifference, not

inadequacy,' a claim for gross negligence must fail as a matter of law when the evidence shows that the defendants exercised some degree of care." *Id.* (alterations adopted) (quoting *Kuykendall v. Young Life*, 261 F. App'x 480, 491 (4th Cir. 2008) (unpublished) (per curiam)). Ordinarily, the question of whether gross negligence has been established is a matter for the jury. *Id.* However, when no reasonable juror could find that gross negligence has been established, the court must dismiss the claim. *Id.*

B.

On appeal, Fijalkowski draws our attention to the officers' conduct after he submerged himself for the third time and argues that this conduct amounts to gross negligence under Virginia law.

We disagree and conclude that the facts alleged in the complaint show that the officers exercised some degree of care during that time.[8] In particular, the officers came to the deep end of the pool and monitored Fijalkowski, they eventually permitted Brooks to rescue him, and they also assisted in the rescue. Even if they waited too long to do so, we agree with the district court that the claim is one of inadequacy, not indifference.

Accordingly, we affirm the district court's dismissal of Fijalkowski's gross negligence claim.

IV.

[8] As a result, we need not address the officers' arguments that Fijalkowski can't recover damages because he committed the common law crime of attempted suicide and that they aren't liable because they didn't owe Fijalkowski a special duty.

For the reasons given, the district court's dismissal of Fijalkowski's complaint is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MATEUSZ FIJALKOWSKI, **Plaintiff,**	)	
v.	)	**Civil Action No. 1:18-cv-00492**
M. WHEELER, et al., **Defendants.**	)	

MEMORANDUM OPINION

This case arises from a somewhat bizarre and nearly tragic set of events. Plaintiff, a citizen and resident of Poland, claims Officers Wheeler, Adcock, Blakely, Bronte-Tinkew, Clark, Grande, Jakowicz, Labarca, McNaught, Mulhern, and Zesk ("the police defendants") are liable for violating plaintiff's Fourteenth and Fourth Amendment rights pursuant to 42 U.S.C. § 1983[1] and for gross negligence under Virginia law. Plaintiff also brings a claim of negligence against defendants Brooks, a lifeguard and plaintiff's former co-worker, and American Pool Inc., plaintiff's former employer ("the pool defendants"). The police defendants and the pool defendants have each moved to dismiss plaintiff's Complaint on a variety of grounds.

At issue on defendants' motions to dismiss are the following questions:

(i) Are the police defendants entitled to qualified immunity with respect to plaintiff's Fourteenth Amendment claim brought pursuant to § 1983?

Put differently, did the police defendants violate plaintiff's "clearly established" substantive due process rights by preventing a lifeguard from taking timely steps to rescue plaintiff from drowning himself?

(ii) Did the police defendants violate plaintiff's substantive due process rights by their own failure to prevent plaintiff from drowning himself?

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[1] Plaintiff represented in his opposition to the police defendants' motion to dismiss that plaintiff consents to the dismissal of the due process claim alleged in Count II because it is duplicative of Counts I and III, which also allege due process claims. Mem. in Opp. to Mot. to Dismiss Police Defs. at 1 (ECF No. 24).

(iii) Did the police defendants violate plaintiff's right against unreasonable seizure by failing to prevent plaintiff from drowning himself after securing plaintiff within the fenced-in area around the pool?

(iv) Did the police defendants' failure to prevent plaintiff from drowning himself constitute gross negligence?

(v) Does Virginia's workers compensation scheme cover plaintiff's negligence claims against the pool defendants and thus deprive this court of subject matter jurisdiction over that claim?

I.

The standards that govern a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), Fed. R. Civ. P., and a motion to dismiss for failure to state a claim under Rule 12(b)(6), Fed. R. Civ. P., are well settled and thus require only brief elaboration.

Pursuant to Rule 12(b)(6), a complaint must be dismissed when the plaintiff fails to state a claim upon which relief can be granted. The district court must examine the face of the complaint and, taking all allegations of fact as true and construing them in the light most favorable to plaintiff, decide whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A party may also seek dismissal of the complaint pursuant to Rule 12(b)(1) on the ground that the court lacks subject matter jurisdiction to decide the claims alleged in the complaint. Similar to a 12(b)(6) motion, the district court must assume the truth of the facts alleged in the complaint and decide whether the complaint alleges facts upon which subject matter jurisdiction can be based.[2] *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

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[2] The Fourth Circuit has also recognized that a party may attack subject matter jurisdiction pursuant to Rule 12(b)(1) by showing that the jurisdictional allegations of the Complaint are not true. *Adams*, 697 F.2d at 1219. The court may then go beyond the allegations of the Complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations. *Id.* This alternative approach to challenging subject matter jurisdiction is not in issue in this case.

II.

The following facts are derived from the well-pleaded allegations in the Complaint, which are taken as true for the purposes of a motion to dismiss.[3] *See Papasan v. Allain*, 478 U.S. 265, 283 (1986).

In the spring of 2016, plaintiff signed up for a program that would allow him to work in the United States for the summer. Compl. ¶ 6. Plaintiff obtained employment with defendant American Pool Inc. as a pool attendant at the Riverside Apartments swimming pool in Fairfax County, Virginia. *Id.* ¶¶ 7, 9. On May 23, 2016, plaintiff arrived in the United States, and three days later plaintiff began his employment with defendant American Pool Inc. *Id.* ¶ 9. Defendant American Pool Inc. trained plaintiff to clean the pool, arrange deck chairs, and check the pH level of the water. *Id.* ¶ 10. Plaintiff did not know how to swim, and defendant American Pool Inc. did not require him to perform lifeguarding duties as part of his employment. *Id.* ¶¶ 10, 16.

On May 30, 2016, plaintiff arrived for work at the Riverside Apartments pool. At some point that afternoon, plaintiff experienced a psychotic episode,[4] which was caused by plaintiff's bipolar disorder. *Id.* ¶¶ 2, 13, 53. Plaintiff exhibited irrational behavior, such as arguing with guests over the colored wristbands required for entry into the pool and grabbing one young woman by the arm and ripping off her wristband. *Id.* ¶ 11. Plaintiff began talking to himself in Polish and walking around the pool without purpose and appeared to be emotionally or mentally distressed. *Id.* Defendant Brooks, who was a lifeguard also employed by defendant American Pool Inc.,

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[3] Additionally, certain facts are also taken from a video recording of part of the May 30, 2016 incident, which the Complaint explicitly incorporates into the Complaint by reference. Compl. ¶ 26; *see also Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) (holding that documents that are explicitly incorporated into the Complaint by reference may be considered at the motion to dismiss stage). The video recording of the incident may be viewed at https://www.youtube.com/watch?v=Iv5luuG-SWo.

[4] Psychosis is defined as "a serious mental illness . . . characterized by defective or lost contact with reality often with hallucinations or delusions." *Psychosis*, MERRIAM-WEBSTER.COM (last visited Feb. 6, 2019).

witnessed plaintiff's behavior and called for police assistance. *Id.* ¶ 12. The police defendants responded to the pool a few minutes later. *Id.* ¶¶ 13, 14.

When the police defendants arrived, the police attempted to communicate with plaintiff several times, but plaintiff did not acknowledge the police defendants. *Id.* ¶ 14. Instead, plaintiff blew a lifeguard whistle and continually moved away from the police defendants. *Id.* After discussing how to proceed, the police defendants directed all pool patrons to leave the pool area and locked the fence that surrounded the pool. *Id.* ¶ 17. The only individuals that remained inside the fenced-in pool area were plaintiff, defendant Brooks, and the police defendants. *Id.* Defendant Brooks informed the police defendants about plaintiff's behavior and told the police defendants that plaintiff was experiencing a psychotic episode. *Id.* ¶ 15. Defendant Brooks also told the police defendants that plaintiff could not swim. *Id.* ¶ 16. According to the Complaint, the police defendants understood that plaintiff's serious mental health crisis and related behavior made plaintiff a potential risk of harm to himself and to others at the pool. *Id.* ¶ 19.

The police defendants called one of plaintiff's Polish roommates and a Polish-speaking police officer to the pool to attempt to communicate with plaintiff, whose English was poor. *Id.* ¶¶ 6, 21, 25. Again, plaintiff would not acknowledge either the Polish-speaking officer or plaintiff's Polish roommate. *Id.* ¶¶ 21, 25.

Plaintiff continued to exhibit unusual and erratic behavior. Plaintiff paced around the pool and continued to talk to himself, apparently praying in Polish. *Id.* ¶ 24. Plaintiff threw his cell phone into the deep end of the pool and then walked into the pool, submerging himself in the deep end, which was eight feet deep. *Id.* ¶¶ 24, 37. After recovering the cell phone, plaintiff emerged from the pool. Plaintiff then threw his cell phone into the deep end of the pool a second time. Again, plaintiff walked into the pool and submerged himself underwater. And again, plaintiff

emerged from the pool after recovering the cell phone. Plaintiff then climbed into a lifeguard tower and shouted and blew his whistle for no reason. The police defendants continued to attempt to communicate with plaintiff, but plaintiff did not respond. *Id.* ¶ 24.

After some period of time, plaintiff finally stood calmly and silently for about one minute near the ladder at the shallow end of the pool. *Id.* ¶¶ 26, 28. Plaintiff then walked slowly to the ladder and entered the water a third time. *Id.* ¶ 28. The police defendants neither ordered plaintiff not to re-enter the pool nor physically prevented plaintiff from re-entering the pool. *Id.* ¶ 27.

Plaintiff again walked into the deep end of the pool and submerged himself underwater. *Id.* ¶¶ 28, 29. Defendant Brooks and the police defendants stood around the pool and watched plaintiff. *Id.* ¶ 30. After some period of time, plaintiff grabbed onto the pool's drain cover underwater in the deep end and struggled not to surface. Plaintiff eventually vomited underwater and then stopped moving. *Id.* ¶ 31. After being underwater for one minute and twenty-two seconds, plaintiff released the air retained in his lungs. The police defendants and defendant Brooks continued to stand around the pool and look at plaintiff underwater. *Id.* ¶ 32. According to the Complaint, the police defendants and defendant Brooks should have recognized that plaintiff was at risk of drowning after plaintiff had been submerged for thirty seconds and had released the air from his lungs. *Id.* ¶¶ 34, 39.

At some point in time unspecified by the Complaint, defendant Brooks expressed that he needed to enter the pool to rescue plaintiff. *Id.* ¶ 40. As a trained lifeguard with access to rescue equipment, defendant Brooks was fully capable of rescuing plaintiff. *Id.* ¶ 41. Nonetheless, one or more of the police defendants ordered defendant Brooks not to enter the pool. *Id.* ¶ 40. Although defendant Brooks did not agree with the police defendants, defendant Brooks obeyed the police defendants' order. *Id.* ¶ 42.

After plaintiff had been submerged for over two and one-half minutes, defendant Brooks again requested permission from the police defendants to dive into the pool and rescue plaintiff. This time the police defendants gave defendant Brooks permission to dive into the pool. *Id.* ¶ 43. Defendant Brooks brought plaintiff's body to the surface, and several of the police defendants removed their belts and jackets and jumped into the pool to help drag plaintiff out of the pool. *Id.* ¶¶ 45, 47. In total, plaintiff had been submerged for two minutes and forty-four seconds. *Id.* ¶ 46.

The police defendants began to perform cardio-pulmonary resuscitation ("CPR") on plaintiff. *Id.* ¶ 47. Emergency medical technicians ("EMTs") arrived about two minutes later and used a ladder to climb over the locked pool fence to reach plaintiff. *Id.* ¶ 48. Upon arrival, the EMTs found that plaintiff was not breathing and did not have a pulse. *Id.* ¶ 49. The EMTs continued CPR and applied an automatic external defibrillator to plaintiff's chest. *Id.* ¶ 50. The EMTs revived plaintiff and transported plaintiff to Fairfax Hospital Emergency Department. *Id.* ¶ 51.

Plaintiff remained in the hospital's Heart and Vascular Institute until June 8, 2016. Thereafter, plaintiff was transferred to the hospital's psychiatric unit, where he was diagnosed with bipolar disorder and was found to have suffered from psychosis, thought disorganization, delusions, and paranoia on May 30, 2016. Plaintiff retained only scattered memories of what had occurred during his psychotic episode. *Id.* ¶ 53. On June 14, 2016, plaintiff was discharged from the hospital and returned to Poland with his father. *Id.* ¶ 54.

Based on these facts, plaintiff has brought suit to recover damages for the physical and mental injury, emotional distress, and medical expenses caused by the conduct allegedly taken by defendants in response to plaintiff's psychotic episode and attempt to drown himself. Specifically, plaintiff claims the police defendants are liable for violating plaintiff's Fourteenth and Fourth

Amendment rights pursuant to 42 U.S.C. § 1983 and for gross negligence under Virginia law. Plaintiff also advances claims of negligence under Virginia law against the pool defendants. Defendants seek dismissal of these claims on a variety of grounds, each of which are addressed in turn below.

III.

In Counts I, III, and IV of the Complaint, plaintiff seeks to recover damages pursuant to 42 U.S.C. § 1983 for alleged violations by the police defendants of plaintiff's right to due process under the Fourteenth Amendment of the United States Constitution and his right against unreasonable seizure under the Fourth Amendment.

Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." This statute "reflects a congressional judgment that a 'damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees.'" *Gomez v. Toledo*, 446 U.S. 635, 638 (1980) (quoting *Owen v. City of Independence*, 445 U.S. 622, 651 (1980)). Yet importantly, the well-established, judicially-created[5] defense of qualified immunity shields federal and state officials from civil liability under § 1983 "unless their actions violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pinder v. Johnson*, 54 F.3d 1169, 1173 (4th Cir. 1995) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A right

[5] The Supreme Court recognized the qualified immunity defense under § 1983 in view of the existence of similar protections from liability afforded to government actors at common law that, as the Supreme Court has explained, "were not abrogated by covert inclusion in the general language of § 1983." *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (internal quotes omitted); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993); *Malley v. Briggs*, 475 U.S. 335, 342 (1986) ("[O]ur role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice."). *But see Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (stating that the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 815–20 (1982), "completely reformulated qualified immunity along principles not at all embodied in the common law").

is "clearly established" if "the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014). In other words, there need not be "a case directly on point" for a right to be "clearly established," but "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). To determine whether the constitutional question is "beyond debate," courts in the Fourth Circuit must look to "cases of controlling authority in [this] jurisdiction, as well as the consensus of cases of persuasive authority from other jurisdictions." *Sims v. Labowitz*, 885 F.3d 254, 262 (4th Cir. 2018).

The well-settled purpose of the qualified immunity defense "is to limit the deleterious effects that the risks of civil liability would otherwise have on the operations of government." *Pinder*, 54 F.3d at 1173 (citing *Anderson*, 483 U.S. at 638). The defense protects society from "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Torchinsky v. Siwinski*, 942 F.2d 257, 260–61 (4th Cir. 1991). This concern is especially acute in the context of police work, where "decisions must be made in an atmosphere of great uncertainty." *Pinder*, 54 F.3d at 1173. Indeed, the Fourth Circuit has cautioned that "[h]olding police officers liable for every injurious consequence of their actions would paralyze the functions of law enforcement," *id.*, and would severely hamper "the ability of police officers to protect the public." *Torchinsky*, 942 F.2d at 261. Therefore, the qualified immunity defense "allows officials the freedom to exercise fair judgment," *Pinder*, 54 F.3d at 1173, by protecting officers who did not have "fair notice that [their] conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

Furthermore, because qualified immunity is "an *immunity from suit* rather than a mere defense to liability," the Supreme Court has "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (emphasis in original; internal quotes omitted). The Supreme Court has also emphasized that "[c]ourts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'" *Ashcroft*, 563 U.S. at 735. Based on these concerns, the Supreme Court has held that a district court has discretion in a § 1983 case to dismiss the case on the ground that the defendant is shielded by qualified immunity without deciding whether the defendant's conduct actually constituted a violation of the Constitution. *Pearson v. Callahan*, 555 U.S. 223, 237 (2009). This discretion should be guided by "the circumstances in the particular case at hand," including whether the suit "could be disposed of more readily" on the basis of qualified immunity. *Id.* at 236–37.

It is important to note that plaintiff's counsel has argued vigorously that federal courts should abandon or abrogate the qualified immunity defense because it has created a safe haven for government officials to commit constitutional torts and because the doctrine has no historical basis in the common law at the time Congress enacted § 1983. In support of this argument, plaintiff's counsel has submitted a substantial number of law review articles, some of which are quite cogent,[6] that criticize the qualified immunity defense and seek its restriction or abolition. Nonetheless, lower federal courts do not have the authority to abrogate or ignore a judicially-created doctrine sanctioned by the Supreme Court absent a constitutional impediment, which is not present here.

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[6] *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018). Also worth mentioning is John C. Jeffries, *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851 (2010), which is especially cogent on this subject.

The analysis thus proceeds on the basis of settled precedent from the Supreme Court, the Fourth Circuit, and other pertinent cases concerning the contours and substance of the qualified immunity defense.

A.

In Count III, plaintiff claims that the police defendants violated plaintiff's Fourteenth Amendment right to substantive due process under the state-created danger doctrine. Specifically, plaintiff argues that the police defendants substantially enhanced the dangerous situation resulting in plaintiff's injury by ordering defendant Brooks not to enter the pool to rescue plaintiff until plaintiff had been submerged underwater for two and one-half minutes. In response, the police defendants argue (i) that their conduct did not violate plaintiff's due process rights and (ii) that they are protected by qualified immunity.

Because this case presents a close question with respect to the question whether the police defendants' conduct—*i.e.* temporarily delaying a lifeguard from rescuing an individual who is experiencing a psychotic episode from drowning himself—constitutes a due process violation under the state-created danger doctrine, analysis properly begins with the qualified immunity inquiry. *See Ashcroft*, 563 U.S. at 735; *Pearson*, 555 U.S. at 237. The first step, then, is to outline the controlling authority governing the state-created danger doctrine.

The seminal case of *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989), is commonly acknowledged as the genesis of the state-created danger doctrine.[7] In *DeShaney*, the Supreme Court concluded that the Department of Social Services had not violated the plaintiff's substantive due process rights by failing to protect the plaintiff from his father's abuse. *Id.* at 192–

[7] *See, e.g.*, *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001) ("The clear implication of the Court's language, which was written in 1989, was that a state could be liable when it affirmatively acts to create, or increases a plaintiff's vulnerability to, danger from private violence.").

95. This was so, the Supreme Court held, because "[w]hile the State may have been aware of the dangers that [the plaintiff] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 197.

The Fourth Circuit first recognized this state-created danger doctrine in *Pinder v. Johnson*, 54 F.3d 1169, 1176–77 (4th Cir. 1995). In *Pinder*, the Fourth Circuit noted that "[w]hen the state itself creates the dangerous situation that resulted in a victim's injury . . . the state is not merely accused of a failure to act; it becomes much more akin to an actor itself directly causing harm to the injured party" and may accordingly violate the victim's substantive due process rights. *Id.* at 1177. Yet importantly, the Fourth Circuit in *Pinder* held that the state-created doctrine was inapplicable to the facts in that case. There, a police officer, who had assured the plaintiff that her abusive ex-boyfriend would be incarcerated overnight, charged the ex-boyfriend only with minor offenses. Consequently, the ex-boyfriend was not incarcerated overnight but instead was released on his own recognizance and then proceeded immediately to set fire to the plaintiff's house, with her young children still inside, resulting in the death of the children. *Id.* at 1172. On these facts, the Fourth Circuit held that the police officer had not violated the plaintiff's due process rights because "the state did not 'create' the danger, it simply failed to provide adequate protection from it." *Id.* at 1175. This was so, the Fourth Circuit explained, because the state does not "'create[] a danger' every time it does anything that makes injury at the hands of a third party more likely" when "the real 'affirmative act' . . . was committed by [the third party], not by [the State]." *Id.*

Since *Pinder*, the Fourth Circuit has had several occasions to consider due process claims alleging a state-created danger. The Fourth Circuit's recent decision in *Doe v. Rosa*, 795 F.3d 429 (4th Cir. 2015) provided further clarity to the limits of a state actor's liability for due process violations under the state-created danger doctrine. There, the Fourth Circuit held that the state-

created danger doctrine is "narrow" and requires the plaintiff to show (1) that the state actor "created or substantially enhanced the danger" resulting in plaintiff's harm, and (2) that the state actor "did so directly through affirmative acts, not merely through inaction or omission." *Id.* at 439. In that case, the president of The Citadel, a public university, decided not to notify the authorities about allegations made in 2007 that a camp counselor, ReVille, working at The Citadel's youth summer camp had sexually abused campers in 2002. *Id.* at 433–35. Before the allegations were made, a family had invited ReVille to move into their home as a caregiver for their children. Thereafter, ReVille sexually abused the children multiple times a week. *Id.* at 435. Without knowledge of the allegations that the president had failed to report, the family continued to allow ReVille to live with the family, resulting in ReVille's continued abuse of the children for three more months. *Id.* at 435–36. On these facts, the Fourth Circuit concluded that the plaintiffs had not demonstrated a cognizable due process claim under the state-created danger doctrine. *Id.* at 442.

The Fourth Circuit in *Doe* provided three reasons for this holding. First, the president was not liable for the sexual abuse committed by ReVille before the allegations had been made because the State "could not have created a danger that already existed." *Id.* at 439. Second, with respect to the sexual abuse that occurred after the president failed to report the allegations against ReVille, the Fourth Circuit concluded that the children did not "face a new or increased risk of abuse." *Id.* at 440. This was so, the Fourth Circuit explained, because the children were placed in "no worse position than that in which [they] would have been had [the president] not acted at all." *Id.* (quoting *DeShaney*, 489 U.S. at 201). Third, the Fourth Circuit concluded that the plaintiffs had failed to demonstrate that "affirmative acts" by the president had created or increased any danger. *Id.* Rather, the president's failure to report the allegations against ReVille amounted only to inaction;

the president "merely failed to take actions that he was under no constitutional obligation to take." *Id.* at 442.

Also instructive on the issue of due process claims under the state-created danger doctrine is *Robinson v. Lioi*, 536 Fed. App'x 340 (4th Cir. 2013, in which the Fourth Circuit concluded, for the first and only time, that the plaintiff in that case had alleged a viable due process violation under the state-created danger doctrine. There, a police officer conspired to prevent the arrest of man who was wanted on assault charges for physically abusing his wife. Specifically, the police officer withheld the arrest warrant from the unit responsible for serving it, sent the man text messages to help the man evade capture, and falsely claimed the arrest warrant could not be found when the man eventually reported to the police headquarters. *Id.* at 341. As a result, the man remained at large and murdered his wife. *Id.* On these facts, the Fourth Circuit concluded that the police officer did not merely fail to act. To the contrary, the police officer had violated the wife's substantive due process rights under the state-created danger doctrine because, by conspiring to prevent the arrest of a man who had violently abused his wife, the police officer committed affirmative acts that directly enabled the man to murder his wife. *Id.* at 344.

The above cases are instructive both for determining the contours of an individual's substantive due process rights under the state-created danger doctrine and for considering whether the due process right that plaintiff claims was violated in the instant case was clearly established at the time of the police defendants' conduct. In the latter respect, plaintiff argues that under the state-created danger doctrine the police defendants violated plaintiff's Fourteenth Amendment right to substantive due process by ordering defendant Brooks, a trained lifeguard, to refrain from rescuing plaintiff from drowning until plaintiff had been submerged for two and one-half minutes. Even assuming, *arguendo*, this constitutes a cognizable due process violation under the state-

created danger doctrine—an assumption that is not without its difficulties[8]—plaintiff's claim must nevertheless be dismissed on the basis of qualified immunity.

As a review of the Supreme Court's and the Fourth Circuit's state-created danger cases reflects, the police defendants did not violate any clearly established substantive due process right enjoyed by plaintiff. As the Fourth Circuit has repeatedly emphasized, the state-created danger doctrine is "narrow." *Doe*, 795 F.3d at 437; *Robinson*, 536 F. App'x at 343–44. Indeed, to date, the only circumstances deemed by the Fourth Circuit to constitute a state-created danger were the facts presented in *Robinson*, 536 F. App'x at 341, 344, in which a police officer actively conspired with a violent man to help him evade arrest, thereby directly creating the opportunity for the man to murder his wife. There is no basis on which to conclude that the Fourth Circuit's ruling in *Robinson* or any of the many cases in which the Fourth Circuit has declined to find a valid claim for a state-created danger were sufficient to bar the police defendants' qualified immunity defense. Put simply, the Supreme Court's and the Fourth Circuit's decisions do not place "beyond debate" and do not give "fair notice" to the police defendants here that it is unlawful under the state-created danger doctrine for a police officer to delay a lifeguard for two and one-half minutes from attempting to rescue a mentally unstable individual from drowning himself. *See Ashcroft*, 563 U.S. at 741; *Brosseau*, 543 U.S. at 198. This is so not simply because the Fourth Circuit has not considered a case factually on all fours with the instant case; rather, this conclusion is also based on the fact that a police officer's efforts to enable a third party to commit a violent act, which

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[8] In this respect, the Complaint does not allege how long plaintiff had been submerged before defendant Brooks first requested permission to dive in and rescue plaintiff, which the police defendants prohibited him from doing. Depending on how much time had elapsed, plaintiff may have already drowned. Therefore, it is not clear that the police defendants' conduct, namely, preventing defendant Brooks from rescuing plaintiff, "substantially enhanced the danger" that resulted in harm to plaintiff, as is required for a cognizable state created danger claim. *See Doe*, 795 F.3d at 439. But it is unnecessary to reach or decide this issue because for the reasons already stated, it is appropriate here to begin the analysis by determining whether the police defendants are protected by qualified immunity without deciding whether the police defendants' conduct in fact violated plaintiff's substantive due process rights. *See Ashcroft*, 563 U.S. at 735; *Pearson*, 555 U.S. at 237.

constituted a state-created danger in *Robinson*, are of "an entirely different nature" from a police officer's temporary inhibition of a would-be rescuer in an emergency situation involving a person exhibiting psychotic behavior. *See Doe*, 795 F.3d at 442. Thus, because a review of the controlling precedent demonstrates that plaintiff's asserted due process right was not clearly established at the time of the police defendants' conduct, the police defendants are entitled to qualified immunity from plaintiff's due process claim.

Seeking to avoid this conclusion, plaintiff does not meaningfully dispute that the police defendants did not violate any due process right that was clearly established under existing Fourth Circuit precedent. Instead, plaintiff argues that the police defendants' alleged conduct was so egregious that no precedent was necessary to give the police defendants fair notice that their conduct was unlawful and violative of plaintiff's rights. To be sure, the Fourth Circuit has recognized that "when the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002) (internal quotes omitted).[9] In this respect, the Seventh Circuit has persuasively held that a reasonable police officer would know, even without factually apposite precedent, that a fundamental protection guaranteed by an individual's right to substantive due process is that "the state cannot arbitrarily assert its power so as to cut short a person's life." *Ross v. United States*, 910 F.2d 1422, 1433 (7th Cir. 1990). The question, then, is whether the police defendants' alleged conduct exhibited such

[9] Judge Posner expressed this point in typically lucid fashion when he observed that "[t]here has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances." *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990).

arbitrary disregard toward plaintiff's life that a reasonable officer in the police defendants' shoes would have known without guidance from the courts that the conduct was unconstitutional.

In this respect, the facts alleged in the Complaint demonstrate that the police defendants' conduct was not so patently arbitrary and violative of plaintiff's due process rights that a reasonable official would have known that it was unconstitutional. According to the Complaint, the police defendants observed that plaintiff had twice walked to the deep end of the pool where he fully submerged himself for a period of time before safely emerging from the deep end and exiting the pool of his own accord. Moreover, prior to plaintiff's attempt to drown himself, the police defendants were aware that plaintiff was mentally unstable and that plaintiff had taken a series of bizarre and aggressive actions, including grabbing a young woman by the arm, arguing with pool patrons, throwing his cell phone into the pool, shouting at the police, and otherwise exhibiting a total lack of responsiveness to efforts by the police defendants and other crisis intervention personnel to communicate with him. Indeed, according to the Complaint, the police were aware that plaintiff's psychotic episode made plaintiff "a potential risk of harm to himself and others at the pool." Compl. ¶ 19. For these reasons, there was a sufficient basis on which the police defendants could rationally conclude that it was neither safe nor necessary for defendant Brooks to attempt to rescue plaintiff during the period of time that the police defendants ordered defendant Brooks not to enter the pool.

Therefore, in view of the circumstances confronting the police defendants, it is appropriate to conclude that the police defendants' conduct, namely ordering a lifeguard not to enter the pool to rescue plaintiff from drowning himself until plaintiff had been submerged for two and one-half minutes, was not so irrational or taken with such disregard toward plaintiff's safety that a reasonable police officer would have known such conduct violated plaintiff's constitutional rights.

To the contrary, the police defendants might reasonably have decided that to allow the lifeguard to enter the pool at the time of the first request would have endangered the lifeguard and plaintiff and that it was appropriate to wait to see if plaintiff would emerge from the pool voluntarily as he had done twice before.

Importantly, this is not to say that the police defendants' decision to inhibit the lifeguard for as long as they did was prudent or correct. Yet, as the Sixth Circuit has persuasively stated, "public safety officials should have broad authority to decide when civilian participation in rescue efforts is unwarranted. If police officials are not satisfied that would-be rescuers are equipped to make a viable rescue attempt . . . it would certainly be permissible to forbid such an attempt." *Beck v. Haik*, 234 F.3d 1267 at *4 (6th Cir. 2000). Thus, for the reasons already stated, it would be inappropriate to conclude, based on the facts alleged in the Complaint, that the police defendants' actions were so egregious as to deny qualified immunity to those defendants in the absence of clear guidance from controlling precedent.

Furthermore, the case on which plaintiff chiefly relies in support of his argument to the contrary, *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990), is distinguishable and thus neither controlling nor persuasive authority in the instant case. In *Ross*, a twelve-year old boy fell into a lake and sank. *Id.* at 1424. Ten minutes later, two lifeguards, two firefighters, and one police officer arrived on the scene with equipment to conduct a rescue. *Id.* In addition, two civilians with a boat and scuba-diving equipment offered to assist in the rescue. *Id.* Yet, despite the presence of abundant rescue personnel and equipment on-scene, the county deputy sheriff ordered the persons present at the lake to cease all rescue efforts because, pursuant to a county policy, only divers from the city fire department were authorized to rescue someone drowning in the lake. *Id.* at 1424–25. Moreover, the deputy sheriff threatened to arrest anyone who entered the water and positioned his

own boat to prevent the two civilian divers from diving into the lake. *Id.* at 1425. Authorized city divers did not arrive at the lake and retrieve the boy's body until the boy had been underwater for thirty minutes, twenty minutes after the initial, non-authorized rescuers arrived at the scene. *Id.* On these facts, the Seventh Circuit concluded that the deputy sheriff was not entitled to qualified immunity on the plaintiff's due process claim despite the lack of apposite precedent because "[t]here was simply no rational reason for [the deputy sheriff] to prefer 'authorized' but equally competent rescuers located away from the scene." *Id.* at 1433.

Ross is distinguishable from the facts in the instant case in two key respects. First, unlike *Ross*, where the deputy sheriff obstructed private rescue efforts for twenty minutes and no rescue was conducted until the boy had been underwater for thirty minutes, the police defendants here prevented defendant Brooks from entering the pool at most for only two and one-half minutes.[10] This substantial difference in time is significant because delaying private rescue efforts for a relatively brief period of time is far less indicative of a disregard for the safety of the drowning individual and may be necessary to enable public safety officials to assess an uncertain emergency situation before exercising their discretion to allow civilians to attempt a rescue. Second, and more importantly, for the reasons already stated, the police defendants here, unlike the deputy sheriff in *Ross*, had an ample basis on which to conclude that it was neither safe nor necessary for defendant Brooks to attempt to rescue plaintiff for at least some period of time. Again, this is not to say that the police defendants correctly judged the necessary amount of time by which to delay defendant Brooks's rescue efforts; indeed, in hindsight it appears that the police defendants may have waited

[10] As noted previously, the Complaint does not specify how much time elapsed between defendant Brooks's first request for permission to attempt to rescue plaintiff, which the police defendants denied, and his second request to do so, which the police defendants granted. In any event, even if defendant Brooks's made his first request immediately after plaintiff submerged himself in the pool, the total amount of time by which the police defendants delayed defendant Brook's rescue attempt would be at most less than three minutes, which is substantially less than the twenty-minutes by which the deputy sheriff in *Ross* delayed rescue.

too long. But unlike the deputy sheriff in *Ross*, the police defendants had adequate, rational reasons to support their decision to prevent defendant Brooks from entering the pool for a brief period of time. Therefore, *Ross* is inapposite and does not compel the conclusion that the police defendants' conduct was sufficiently arbitrary such that a reasonable police officer in their shoes would have known the conduct was clearly unconstitutional.

Accordingly, the police defendants are entitled to the defense of qualified immunity to plaintiff's state-created danger due process claim.

B.

In Count I, plaintiff claims that the police defendants also violated plaintiff's substantive due process rights by failing to prevent plaintiff to enter into the pool while suffering a mental health episode. This argument fails because plaintiff was not in police custody at the time plaintiff harmed himself.

In *DeShaney*, 489 U.S. at 196, the Supreme Court held that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." Yet, an exception to this rule is that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 199–200. For example, the State is required to ensure the reasonable safety of incarcerated prisoners, involuntarily committed mental patients, and children who have been involuntarily removed from their homes and placed in state-approved foster care. *Id.* at 198–99; *Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 176 (4th Cir. 2010). In other words, a person is in the government's "custody," for purposes of due process analysis, when "the State by the affirmative exercise of its

power so restrains an individual's liberty that it renders him unable to care for himself." *DeShaney*, 489 U.S. at 200.

Under *DeShaney*, it is clear that plaintiff was not in the "custody" of the State when plaintiff submerged himself in the pool. It is true, as plaintiff highlights, that the police defendants had locked the fence surrounding the pool area and had removed all civilians from the pool area. But these facts do not demonstrate that the police defendants here "so restrain[ed] [plaintiff's] liberty that it render[ed] [plaintiff] unable to care for himself." *DeShaney*, 489 U.S. at 200. Simply put, the restraint imposed on plaintiff's liberty by the police defendants was minimal; temporarily locking the fence around the pool lounge area did not rise to the level of "remov[ing] [plaintiff] from free society . . . analogous to incarceration or institutionalization." *Id.* at 201 n.9. Moreover, it is plainly apparent that plaintiff's own psychotic symptoms, and not the police defendants' affirmative conduct, rendered plaintiff unable to care for himself. Thus, because plaintiff had not been taken into state custody, plaintiff's substantive due process claim based on the police defendants' failure to protect plaintiff from drowning himself fails.

C.

Plaintiff next claims in Count IV that the police defendants violated plaintiff's Fourth Amendment right against unreasonable seizure by failing to detain plaintiff and instead allowing plaintiff to drown himself. This claim fails because plaintiff was not seized by the police defendants.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend IV. A "seizure" occurs when an officer restrains the liberty of a citizen by means of physical force or

a show of authority to which the citizen yields. *California v. Hodari D.*, 499 U.S. 621, 625–26 (1991).

Because plaintiff's Complaint does not allege that the police defendants applied any physical force to plaintiff, the Complaint must allege that plaintiff submitted to a show of authority by the police defendants. Assuming, *arguendo*, that the police defendants' conduct—locking the pool area fence, removing other civilians from the area, and attempting to communicate with plaintiff—constitutes a show of authority, it is clear that plaintiff did not yield. The police defendants made several attempts to communicate with plaintiff, and, in response, plaintiff ignored the police defendants and continued to walk away from the police defendants. Although it may be true that a reasonable person would not have felt free to leave under the circumstances present here, this fact is not dispositive. *Id.* at 627–28. Because plaintiff, who was experiencing a psychotic episode and exhibiting erratic behavior, did not yield to a show of authority by the police defendants, no seizure occurred. Therefore, as the police defendants did not seize plaintiff, plaintiff's Fourth Amendment claim fails.

IV.

Count V alleges a claim of gross negligence under Virginia common law against the police defendants for failing to prevent plaintiff from harming himself. This claim fails because the alleged actions taken by the police defendants in response to plaintiff's erratic behavior and submersion in the deep end of the pool do not amount to indifference or complete neglect of plaintiff's safety.[11]

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[11] The police defendants also argue that plaintiff's gross negligence claim is barred because "a party who consents to and participates in an immoral or illegal act cannot recover damages from other participants for the consequences of that act." *Zysk v. Zysk*, 239 Va. 32, 34 (1990). In this respect, the Supreme Court of Virginia has held that a plaintiff who commits suicide is barred from bringing a civil action for damages arising from plaintiff's suicide because suicide is an illegal act. *Wackwitz v. Roy*, 244 Va. 60, 65–66 (1992). Yet, the Supreme Court of Virginia also observed that to commit the common law crime of suicide, a person must be "of sound mind" when he takes his own

Virginia law defines gross negligence as "a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person." *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 487 (2004). Because "'the standard for gross negligence [in Virginia] is one of indifference, not inadequacy,' a claim for gross negligence must fail as a matter of law when the evidence shows that the defendants exercised some degree of care." *Elliott v. Carter*, 292 Va. 618, 622 (2016) (quoting *Kuykendall v. Young Life*, 261 Fed. App'x 480, 491 (4th Cir. 2008)).

Here, the allegations in the Complaint demonstrate that the police defendants exercised some degree of care to prevent plaintiff from harming himself in response to plaintiff's psychotic episode and attempt to drown himself. Specifically, the Complaint alleges that after the police arrived at the Riverside Apartments pool, they took the following steps: (i) they attempted to communicate with plaintiff by calling to the scene crisis intervention-trained officers and a Polish-speaking officer; (ii) they monitored plaintiff during the entire time they were on the scene; (iii) they jumped into the pool to help defendant Brooks bring plaintiff above water and out of the pool; and (iv) they performed CPR after plaintiff was removed from the pool. Together, these actions clearly demonstrate that the police defendants exercised some care in assisting plaintiff and that the police defendants were not completely indifferent or neglectful with respect to plaintiff's safety. Indeed, distilled to its essence, plaintiff argues that the police defendants were grossly negligent not because they did nothing to rescue plaintiff, but because they waited too long to rescue plaintiff. This argument fails because, as the Supreme Court of Virginia has made clear,

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life. *Id.* at 65. In the instant case, it appears from the allegations in the Complaint that plaintiff was not of sound mind when he submerged himself in the deep end of the pool and struggled to avoid surfacing. Specifically, the Complaint alleges that plaintiff was suffering from psychosis and delusions and thus was not in touch with reality when he attempted to drown himself. Thus, assuming the truth of the factual allegations in the Complaint, it appears that plaintiff did not commit the crime of attempted suicide and thus is not barred from bringing his tort claims. In any event, it is unnecessary to reach or decide this issue because, as explained above, the Complaint's allegations are insufficient to demonstrate that the police defendants were grossly negligent.

"the standard for gross negligence [in Virginia] is one of indifference, not inadequacy." *Id.* Thus, because the facts alleged in the Complaint establish that police the defendants exercised some degree of diligence and care in response to plaintiff's psychotic episode and attempted self-drowning, plaintiff's gross negligence claim fails to state a claim and must be dismissed.[12]

V.

Finally, Counts VI and VII of the Complaint allege claims of negligence against the pool defendants on the ground that defendant Brooks allegedly abided by directions from the police defendants and failed to take steps to rescue plaintiff from drowning until plaintiff had been submerged for over two and one-half minutes. In response, the pool defendants argue that this court lacks jurisdiction over plaintiff's negligence claim because plaintiff's rights under the Virginia Workers Compensation Act ("the VWCA")[13] constitute plaintiff's sole remedy for defendant Brooks's allegedly negligent failure to prevent plaintiff from drowning himself at the Riverside Apartments pool on May 30, 2016.[14]

The VWCA provides the exclusive remedy for all claims by an employee against an employer or fellow employee[15] for any injury that "is the result of an accident and arises out of

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[12] This conclusion finds further support in two additional facts alleged by the Complaint. First, plaintiff had twice walked to the deep end of the pool where he fully submerged himself for a period of time before safely emerging from the deep end and exiting the pool of his own accord. Second, before plaintiff attempted to drown himself, he had exhibited a series of bizarre and aggressive actions. Indeed, the Complaint specifically alleges that plaintiff's psychotic episode made plaintiff "a potential risk of harm to himself and others at the pool." *See* Compl. ¶ 19. These facts further weaken plaintiff's argument that the police defendants' delay in removing plaintiff from the water, alone, is sufficient to demonstrate that the police defendant were indifferent to plaintiff's safety because there were ample reasons to believe, at least for some period of time, that plaintiff needed no assistance and that it was not safe to attempt to remove plaintiff from the pool.

[13] Va. Code §§ 65.2-100 to 65.2-1310 (2017).

[14] The Fourth Circuit has made clear that it is appropriate to raise an exclusive remedy defense under the Virginia Workers Compensation Act pursuant to a motion to dismiss for lack of jurisdiction under Rule 12(b)(1). *Scott v. CG Belkor, LLC*, 711 Fed. App'x 158, 159–60 (4th Cir. 2018) (per curiam); *Evans v. B.F. Perkins Co., a Div. of Standex Int'l Corp.*, 166 F.3d 642, 647–50 (4th Cir. 1999).

[15] The VWCA's exclusive remedy provision does not extend to claims brought by an employee against a "stranger to the business" of the plaintiff's employer. *Rasnick v. Pittston Co.*, 237 Va. 658, 663 (1989). In the instant case, the

and in the course of the employment." Va. Code §§ 65.2-101 & 65.2-307; *Combs v. Virginia Elec. & Power Co.*, 259 Va. 503, 508 (2000). Accordingly, if the injury alleged in Counts VI and VII was "(1) an injury by accident, (2) arising out of, (3) and in the course of, [plaintiff's] employment," relief under the VWCA constitutes plaintiff's exclusive remedy for such injury, and plaintiff's negligence claims must therefore be dismissed. *Combs*, 259 Va. at 508.[16]

An "injury by accident" is an injury (i) that "appeared suddenly at a particular time and place and upon a particular occasion," (ii) that "was caused by an identifiable incident or sudden precipitating event," and (iii) that "resulted in an obvious mechanical or structural change in the human body." *S. Exp. v. Green*, 257 Va. 181, 187 (1999). Each of these factors is satisfied here because the injury that plaintiff allegedly suffered was a near drowning and cardio-pulmonary arrest caused by defendant Brooks's alleged failure to rescue plaintiff in a timely manner. The particular time, place, and occasion of this injury was at the Riverside Apartments pool on May 30, 2016 during the two to three minutes that elapsed from the time plaintiff submerged himself in the deep end of the pool until the time defendant Brooks eventually entered the pool to rescue plaintiff. The identifiable, precipitating event that caused plaintiff's injury was defendant Brooks's allegedly negligent failure to prevent plaintiff from drowning himself in a timely manner. And as a result of plaintiff's injury, *i.e.* the cardio-pulmonary arrest plaintiff suffered as a result of nearly drowning, plaintiff's body experienced a mechanical or structural change in the form of an inability

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parties do not contend that either of the pool defendants—defendant Brooks and defendant American Pool Inc.—were strangers to the business of defendant American Pool Inc.

[16] Plaintiff devotes much of his argument to a discussion of whether plaintiff's bipolar disease and the psychosis plaintiff experienced on May 30, 2016 qualify as "occupational diseases" that are compensable under § 65.2-400 of the VWCA. This discussion misses the mark. The Complaint does not allege, and the pool defendants do not contend, that plaintiff's bipolar disease or the related psychotic manifestations of the disease are the injuries for which plaintiff seeks to recover via his negligence claims. Rather, the injuries alleged by plaintiff in the Complaint are plaintiff's near drowning and cardio-pulmonary arrest. Accordingly, the correct inquiry under the VWCA is whether these alleged injuries were injuries "by accident arising out of and in the course of the employment." Va. Code § 65.2-101.

to breathe or to circulate blood. Accordingly, it is clear that the injury for which Counts VI and VII seek relief constitutes an "injury by accident."

To constitute an injury arising out of the plaintiff's employment, "the employment must expose the employee to the particular danger causing the injury, notwithstanding the public's exposure generally to similar risks."[17] *Combs*, 259 Va. at 510. Put another way, an injury "arises out of the employment when there is a causal connection between the claimant's injury and the conditions under which the employer requires the work to be performed." *United Parcel Serv. of Am. v. Fetterman*, 230 Va. 257, 258 (1985). These principles, applied here, point persuasively to the conclusion that plaintiff's injury arose from his employment. Plaintiff's position as a pool attendant entailed duties such as cleaning the pool, arranging deck chairs around the pool, and checking the pH level of the water in the pool. Each of these responsibilities required plaintiff to work in close proximity to the pool. Thus, plaintiff's employment plainly exposed plaintiff to the danger of drowning in the pool and the danger that the on-duty lifeguard might fail to take adequate steps to rescue plaintiff from drowning. And it is clear that these workplace conditions bear a "causal connection" to the injury suffered by plaintiff on May 30, 2016. *See United Parcel Serv. of Am.*, 230 Va. at 258. Therefore, plaintiff's injury arose out of his employment.

Finally, it is well-settled that an injury occurs "in the course of the employment" if the injury occurs (1) "within the period of the employment," (2) "at a place where the employee may reasonably be," (3) "and while he is reasonably fulfilling duties of his employment or engaged in doing something incidental thereto." *Combs*, 259 Va. at 511 (citing *Bradshaw v. Aronovitch*, 170

[17] Indeed, it is well-established under Virginia law that it is not necessary to show, for purposes of satisfying the arising out of element, that the employee was exposed to a risk to which a member of the public in his same position would not also have been exposed. *See Immer & Co. v. Brosnahan*, 207 Va. 720, 725 (1967). Thus, plaintiff's argument that the injury did not arise out of employment because the events would have unfolded in the same way even if plaintiff had been a member of the public and not an employee of American Pool Inc. fails.

Va. 329, 385 (1938)). It is clear—and the parties do not dispute—that the first two factors are satisfied here because plaintiff's injury occurred during his shift and in proximity to the pool that plaintiff was responsible for maintaining. Yet, whether plaintiff's injury occurred while he was fulfilling duties of his employment or while he was doing something incidental to those duties is a significantly closer question. Virginia courts have held that an employee's conduct at the time of an injury is incidental to his employment duties if that conduct is "reasonably connected to the fulfillment of employment duties"; it is not necessary to show that plaintiff's conduct was safe or otherwise reasonable. *Town & Country Animal Hosp. v. Deardorff*, No. 0047-08-4, 2008 WL 2338602, at *4 (Va. Ct. App. June 10, 2008) (citing *Tyree v. Commonwealth*, 164 Va. 218, 223 (1935)). The question then is whether plaintiff's erratic, irrational, psychotic behavior occurring in temporal proximity to plaintiff's injury was reasonably connected to the fulfillment of plaintiff's employment duties.

In this respect, the Supreme Court of Virginia's decision in *Combs v. Virginia Elec. & Power Co.*, 259 Va. 503 (2000), is instructive. In that case, Combs, an employee of Virginia Power, participated in an aerobics class at Virginia Power's office during the lunch hour. *Id.* at 506. During the class, Combs began to experience a severe headache stemming from an unknown, pre-existing aneurysm. *Id.* at 506–07. In response, an employee from Virginia Power's Employee Health Services brought Combs to the "quiet room," a room used by ill and recuperating employees, to rest. *Id.* at 506. Combs remained in the "quiet room" for two hours before any employee from Employee Health Services checked on Combs. *Id.* When an Employee Health Services employee finally did check on Combs, Combs had vomited on herself and was in a coma-like state. *Id.* Combs then brought suit against Virginia Power, claiming that the negligent medical care provided by her co-workers exacerbated her pre-existing aneurysm. *Id.* at 506–08. After concluding that Combs's

injury constituted an accident that arose out of her employment, the Supreme Court of Virginia determined that Combs's injury also occurred in the course of her employment. This was so, the *Combs* Court held, because Combs was injured at a place where she was reasonably expected to be while engaged in an activity reasonably incidental to her employment by Virginia Power, namely temporarily deviating from work activities while she experienced her aneurysm-related migraine in Virginia Power's "quiet room." *Id.* at 511–512.

The facts of *Combs* are closely apposite to the facts of the instant case and thus compel the same conclusion. Like the plaintiff in *Combs*, plaintiff here was at work performing his work-related tasks before he began to experience symptoms of his pre-existing bipolar condition. Plaintiff's symptoms manifested themselves in the form of a psychotic episode, in which plaintiff experienced delusions, exhibited a variety of erratic behavior, including submerging himself in the pool, and later retained only partial memories of what had occurred. It was during this psychotic episode that defendant Brooks failed to rescue plaintiff from the pool until after plaintiff had been underwater for almost three minutes. Thus, similar to the plaintiff in *Combs*, plaintiff here was injured by a co-worker while plaintiff had temporarily deviated from the performance of his assigned duties due to the sudden onset of the debilitating symptoms of his bipolar condition. To be sure, those symptoms involved a series of bizarre actions by plaintiff, which would not ordinarily constitute the fulfillment of plaintiff's assigned duties. Yet, as recognized by the Supreme Court of Virginia in *Combs*, an employee's temporary deviation from his assigned tasks, stemming from the sudden onset of the symptoms of a pre-existing illness, is reasonably incidental to the performance of the employee's duties. Thus, plaintiff's injury occurred in the course of his employment because defendant Brooks failed to rescue plaintiff from the pool while plaintiff was doing something reasonably incidental to his work-related tasks, namely temporarily deviating

from the performance of his assigned duties owing to the sudden onset of the symptoms of his bipolar condition.

In sum, the injuries plaintiff claims he suffered as a result of the pool defendants' allegedly negligent rescue efforts were nearly drowning and experiencing cardio-pulmonary arrest. Those injuries were injuries by accident, arising out of, and in the course of plaintiff's employment. Therefore, the VWCA constitutes the exclusive remedy for plaintiff's negligence claims against the pool defendants, and Counts VI and VII must be dismissed for lack of jurisdiction.

VI.

For the reasons stated above, the police defendants' motion to dismiss for failure to state a claim and the pool defendants' motion to dismiss for lack of jurisdiction must both be granted, and all Counts of the Complaint must be dismissed.

An appropriate Order will issue.

Alexandria, Virginia
February 12, 2019

/s/
T. S. Ellis, III
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

(Alexandria Division)

MATEUSZ FIJALKOWSKI,

Plaintiff,

v.

M. WHEELER

and

S. ADCOCK

and

S. BLAKELY

and

R. BRONTE-TINKEW

and

C. CLARK

and

J. GRANDE

and

R. JAKOWICZ

and

L. LABARCA

and

L. McNAUGHT

1:18-cv-492-TSE/MSN

Case # 1:18-cv-_____

COMPLAINT

and)
)
W. MULHERN)
)
and)
)
M. ZESK)
)
and)
)
SEAN BROOKS)
)
Serve: Secretary of the Commonwealth)
)
and)
)
AMERICAN POOL INC.)
6596 Fleet Drive)
Alexandria, VA 22310)
)
Serve: Corporation Service Company)
100 Shockoe Slip, 2nd Floor)
Richmond, VA 23219)

Introductory and Jurisdictional Statement

1. Having been called to a neighborhood pool to contend with a young man demonstrably undergoing a mental health crisis, and whom they were told did not know how to swim, numerous Fairfax County police officers casually watched while the plaintiff entered the pool and drowned himself in eight feet of clear pool water. During this entire time, the police, having undertaken to "isolate and contain" the plaintiff, were in exclusive control of the fenced pool venue, which was locked down and occupied solely by themselves, a lifeguard whom they directed not to act, and the plaintiff. As is apparent on a video made of the event, they took no steps to utilize on-site pool rescue equipment, even as they told the lifeguard on site not to enter

the pool. When, approximately 3½ minutes after the plaintiff entered the pool, the lifeguard finally dove in to rescue him, the plaintiff was clinically dead. His heart had stopped beating and he had stopped breathing. He received cardio-pulmonary resuscitation, recovered, and spent the next two weeks in the hospital, in medical and mental health wards. The plaintiff now brings suit for actual and punitive damages against the officers, and for actual damages against the lifeguard and the company that employed him. The claims against the police defendants arise under the Fourteenth and Fourth Amendments of the United States Constitution, via 42 U.S.C. §1983, and this court has jurisdiction over these claims under 28 U.S.C. §1331. The court has jurisdiction under 28 U.S.C. §1367 over the plaintiff's gross negligence claims against the police officers, and also has jurisdiction over those claims and plaintiff's simple negligence claims against the lifeguard and his employer, under the doctrine of *respondeat superior,* pursuant to 28 U.S.C. §1332, the parties being of diverse citizenship and the amount in controversy exceeding $75,000 exclusive of interest and costs.

Parties

2. Plaintiff Mateusz Fijalkowski is a 23-year old citizen and resident of Poland. For a few weeks in May and June, 2016, he was in the United States, having intended to participate in a program facilitating the summer employment of foreign youth. He spent most of his time in the hospital following his drowning that gave rise to this lawsuit. Mateusz has bipolar disorder.

3. Defendants M. Wheeler, S. Adcock, S. Blakely, R. Bronte-Tinkew, C. Clark, J. Grande, R. Jakowicz, L. Labarca, L. McNaught, W. Mulhern and M. Zesk were, at all times relevant hereto, police officers employed by the Fairfax County Police Department. These

officers, referred to herein as "the defendant police officers" or "the police," were all at the pool in question at the relevant time except for Officer Labarca, who supervised the actions of others at the pool.[1] The actions and inactions of the defendant police officers permitted the drowning here at issue to occur. According to police reports, at least one of them had prior training and experience as a lifeguard.

4. Defendant Sean Brooks is an adult male who was the lifeguard supervisor in charge of the pool where the events here at issue took place. He was at the time an employee of defendant American Pool Inc., working on behalf of his employer, within the scope of his employment, on his employer's pool-management and life-saving business. He was Mateusz's on-site supervisor.

5. Defendant American Pool Inc. ("American Pool") is a Delaware corporation providing a wide range of pool-related services, including pool management and lifeguard services, at community swimming pools. At all relevant times, American Pool was the employer of defendant Brooks and also of Mateusz.

Claim for Relief

6. In the Spring of 2016, Mateusz signed up, in Poland, for a program that would bring him to the United States to work for the summer. He sought to improve his English, which was poor, and to get to know Americans and American culture first hand.

[1]If it is established that Officer Labarca had no direct supervisory involvement in police actions at the pool in the day at issue, this officer will be dismissed voluntarily.

7. Mateusz sought out a job in the United States from a private Polish entity. Relying on what he was told, Mateusz ended up applying for, receiving, and accepting an assignment working for defendant American Pools as an assistant pool manager.

8. Having been advised in Poland that the pools where he would work had only a few feet of water and that there was always an experienced life-guard on site, Mateusz was assured, and believed, that he could satisfactorily discharge the duties that would be assigned to him.

9. Mateusz arrived in the United States on May 23, 2016. Three days later he began work for American Pool as a pool attendant at the Riverside Apartments in Fairfax County. He was given the title of lifeguard.

10. As a new American Pool employee, Mateusz was trained on cleaning the pool, arranging deck chairs, and checking the PH level of the water. American Pool provided no training on life-guard duties, nor tests regarding life-guarding skills. On no occasion was Mateusz asked or otherwise called upon to exercise such skills.

11. On May 30, 2018, Mateusz arrived at work at the Riverside Apartments pool.[2] At the pool, some time before 1:30 P.M. he began acting irrationally. He argued with guests over the colored wristbands required for entry into the pool. Insisting that one young woman not enter the pool, he grabbed her by the arm and ripped off her wristband. He began talking to

[2]Mateusz lacks adequate recollection of what happened to him on this day. Most of the allegations set forth in ¶¶11-50 are taken from the reports made on the same day by the defendant police officers, a report released by the Fairfax Police Chief on June 3, 2016, reports of medical personnel setting forth information provided by the police, and the referenced video of the events. Mateusz accepts and adopts those portions of the police reports that are specifically set forth in the numbered paragraphs of this complaint.

himself in Polish and walking around without purpose, appearing emotionally or mentally distressed.

12. Mateusz's erratic behavior and assault on a pool patron alarmed guests and defendant Brooks, a certified lifeguard who on information and belief was in charge of an adjacent pool at the Riverside Apartments. Defendant Brooks called for police assistance.

13. The defendant police officers responded to the report of an emotionally or psychologically distressed man apparently experiencing a mental health crisis, which they described as "agitated delirium" in the report they later gave to emergency medical technicians.

14. The defendant police officers arrived at the pool around 1:37 P.M. They attempted to communicate with Mateusz several times but he did not acknowledge their presence. Mateusz proceeded to blow his life-guarding whistle and move away from the officers.

15. The defendant police officers were briefed on what had previously transpired at the pool by defendant Brooks and others. They understood that Mateusz was experiencing a mental health crisis. On information and belief, they also learned that he had grabbed a young woman as set forth in ¶11.

16. Defendant Brooks told the defendant police officers that Mateusz, who was ostensibly serving as a lifeguard at one of the Riverside Apartment Pools, could not swim. On information and belief, this information was shared among all the defendant police officers, who caucused to determine how to proceed in the matter.

17. The defendant police officers secured the pool area, retaining exclusive control over Mateusz, his circumstances, and the fenced-in and locked-down pool venue. All pool patrons having been directed to leave the pool area, the only persons the police permitted to remain there

other than themselves were defendant Brooks and Mateusz. The police prevented third parties from gaining access to the pool and ultimately from coming to Mateusz's aid in what ensued.

18. As of the time that the police "isolate[d] and contain[ed]" Mateusz, he was not free to leave and as a practical matter had been seized by the defendant police officers.

19. As of the time the defendant police officers secured the pool area and isolated Mateusz, they were aware that he was a supposed lifeguard who did not know how to swim and who was experiencing a serious mental health breakdown, making himself a potential risk of harm to himself and others at the pool. They were also aware of their power, under *Code of Va.* §37.2-808(F), to take Mateusz into custody for the purpose of securing an appropriate assessment of his need for psychiatric hospitalization or treatment. They did not undertake to do so, Mateusz's manifestly compromised mental status notwithstanding.[3]

20. The defendant police officers had received training in dealing with mentally ill persons. They had at their ready disposal all means needed to effect their professional obligation to secure his, their, and the public's safety by controlling his actions.

21. A Polish-speaking officer was called to the pool but Mateusz would not communicate with him.

22. Defendant Officer Clark was a trained crisis intervention specialist, trained in dealing with mentally ill or distressed subjects. He had been specially called to the pool because of the ongoing crisis posed by Mateusz's instability. He could not communicate effectively with

[3]If, before Mateusz entered the pool the final time, the police defendants learned that he had assaulted the young woman who allegedly lacked the correctly colored wristband, they could have used this assault as a separate basis for detaining him pending issuance of an arrest warrant, thereby assuring that he would not harm himself or others in the meanwhile. They could also have detained him for an involuntary mental health evaluation for this behavior.

Mateusz, however, not merely because Mateusz was unresponsive but because, not knowing Polish, Ofc. Clark felt he could not effectively communicate with him, even via an interpreter.

23. The defendant police officers were aware that their crisis intervention specialist was incapable of addressing the mental health crisis that had caused him to be called to the scene, and that the mental health crisis for which he had been summoned thus continued unabated in front of them.

24. Mateusz continued talking to himself and exhibiting unusual and erratic behavior. He paced around the pool, apparently praying in Polish. He threw his cell phone into the pool and then walked in to recover it, submerging himself in the deep end in the process. Having recovered his cell phone, he threw it a second time into the pool and walked in to recover it, again submerging himself in the deep end in the process. On each occasion he soon emerged from the pool gasping for breath. He also climbed into the life-guard tower and shouted and blew his whistle for no reason. He did not respond to any of the officers' attempts to communicate with him

25. One of Mateusz's Polish roommates arrived at the pool and attempted to speak with him. This too was to no avail.

26. Mateusz finally stood for a period of time several feet from the stairs at the shallow end of the pool. At this time a bystander, believed to have been a pool patron, began videotaping what the occurred. The video is accessible on You Tube at <Fijalkowski v. Wheeler> or at <https://youtu.be/Iv5luuG-SWo>. The contents of the video are incorporated herein by reference.

27. Despite recognizing Mateusz's inability to safeguard himself from possible harm as he once again moved to enter the pool, the defendant police officers did nothing. Specifically, they did not, singly or in a group, tell or gesture to Mateusz not to enter the pool a third time, or place themselves between Mateusz and the pool so as to prevent his attempted entering the water over police direction that he not do so.

28. With the defendant police officers watching and doing nothing, after standing calmly and silently for at least one minute, Mateusz walked slowly to the ladder on the shallow end of the pool and entered the water. (Video 1:00.) He then proceeded to walk, as if in a trance, into the deep end of the pool.

29. Within about 44 seconds Mateusz was completely submerged (video 1:44).

30. About 25 seconds after Mateusz was fully submerged, defendant Brooks came to the deep end of the pool. (Video 2:09). He was thereafter joined at that location by several of the defendant police officers. (Video 2:45.) All looked at Mateusz underwater.

31. Mateusz grabbed onto the pool's drain cover at the deep end, apparently struggling not to surface, vomited under water and eventually stopped moving. The police reported this to the county's emergency medical technicians who shortly thereafter responded to the scene.

32. One minute and 22 seconds after Mateusz's total submersion, the person recording the video is heard saying "Whoa, there go the bubbles," on information and belief referencing Mateusz's release of the air retained in his lungs. (Video at 3:06). At this moment and immediately thereafter, one of the defendant police officers and defendant Brooks are standing looking at Mateusz on the right side of the deep end of the pool. A second defendant police officer is standing several feet away at the corner of the pool, and two other defendant police

officers are standing on the other side of the deep end. Each is looking at Mateusz, doing nothing. Subsequently, additional defendant police officers walk over to the deep end, looking at Mateusz every now and then.

33. After Mateusz was wholly submerged for one minute and 30 seconds, the person recording the video is heard saying "Y'all need to drag this one out." (Video 3:40.)

34. Any reasonable person would have understood that Mateusz was drowning himself, and that with the air being released from his lungs he was at risk of imminent death.

35. In response, the defendant police officers simply milled about the pool aimlessly, doing nothing of consequence. Defendant Brooks now focused more consistently on Mateusz.

36. Fairfax County's Water Recreation Facilities Ordinance, at §69.1-3-9(A), requires every swimming pool to be equipped with a rescue tube able to provide buoyancy to keep two persons afloat, to be placed immediately adjacent to the each lifeguard station, with a so-called "shepherd's crook," a strong, non-telescoping pole at least twelve feet long, with blunted ends, including a body hook used to pull disabled swimmers from the water; and a full-length backboard that is buoyant and capable of supporting a minimum of 350 pounds. The Riverside pool had all of this equipment, which was in view of, and available to, all the defendants at all relevant times. They did not access this equipment. Rather, they simply stood at the side of the pool, watching Mateusz drown. This included defendant Officer McNaught, who on information and belief had prior training and experience as a lifeguard.

37. The pool in which Mateusz drowned was, at its deepest, 8 feet in depth. A person at the bottom of the middle of the pool (width-wise), as Matteusz was, would be a few yards from one side of the pool.

38. On information and belief, defendant Brooks and at least one of the defendant police officers, Officer McNaught, had received professional training in and knew American Red Cross life-saving procedures, which procedures reflected the standard of knowledge and accepted emergency practices in the United States at all relevant times. These procedures include:

* Recognizing when a person needs help or is in danger of drowning.
* Acting immediately to provide the requisite assistance.
* Recognizing and responding to dangerous behaviors that may lead to an emergency.
* Recognizing and responding to a drowning or distressed victim within 30 seconds.

39. All defendants recognized or should have recognized that Mateusz was in distress and at risk of drowning shortly thirty seconds after he submerged himself in the water the third time.

40. Defendant Brooks expressed that he needed to enter the pool to rescue Mateusz, but was directed by one or more of the police defendants not to do so.

41. As a trained lifeguard, defendant Brooks was fully capable of rescuing Mateusz, who was lying in eight feet of water a few feet from three sides of the pool, with all manner of rescue equipment available if desired, as well as eight police officers available to provide assistance if needed.

42. On information and belief, defendant Brooks did not agree with the police direction that he not act to save Mateusz's life, as it conflicted with his training, experience and obligations as a lifeguard. Nevertheless, he negligently acquiesced in that directive.[4]

43. After Mateusz had remained fully submerged for over 2½ minutes, defendant Brooks requested and received police approval to dive into the pool to commence his rescue. (Video 4:18.) This was more than one minute after Mateusz released what appeared to be his last breath of air (video 3:06), after he had vomited underwater, after he had stopped moving, and after a voice is heard on the video is heard saying, incredulously, "And they are not doing anything!" (Video 4:00.)

44. In rescuing Mateusz, defendant Brooks did not need to utilize any of the rescue devices available on site. He managed the rescue without any equipment.

45. As defendant Brooks dove into the pool, several of the defendant police defendants removed their belts and jackets in preparation for jumping into the pool if needed.

46. As defendant Brooks surfaced with Mateusz, the person recording the video stated: "He done turned purple" (Video 4:30). At this moment, two officers jumped in to assist in the rescue (Video 4:34). Several of the defendant police officers exclaimed: "Oh sh*t!" "Oh no!" "Holy sh*t!" "Look at his face!" "It's purple!" "Sh*t!"

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[4]Should discovery reveal that defendant Brooks delayed in rescuing Mateusz not because he was so ordered by the police, as alleged, but – as one officer implied in the official police report – because it was up to him to act independently and he acted as he saw fit, Mateusz will move for leave to amend his complaint so to allege, and to add a claim of punitive damages against him. The instant complaint seeks no punitive damages against defendant Brooks, and alleges only simple negligence against him.

47. Several of the defendant police officers helped drag Mateusz out of the water (Video 4:41). They laid him on his back and began cardio-pulmonary resuscitation ("CPR") (Video at 4:55), continuing until the county's emergency medical technicians ("EMTs") took over. The desperate chest compressions administered to him by the police broke some of his ribs.[5]

48. The EMTs arrived after the police CPR had been underway for over two minutes. (Video 7:24.) Since the gated pool area had been secured, the EMTs erected a ladder to climb over the gate to access the victim. (Video 7:25.) The first EMT reached Mateusz more than three minutes after CPR had been begun on him by the police. (Video 8:00.)

49. On arrival, the EMTs found that Mateusz was not breathing and did not have a pulse. Clinically, he was dead. The EMTs were able to resuscitate him.

50. An EMT recommenced CPR (Video 8:15), following which another EMT brought (Video 9:20), and then applied, an automatic external defibrillator to his chest.

51. Following his successful resuscitation by the EMTs, Mateusz was brought to the Fairfax Hospital Emergency Department.

52. Notwithstanding that the amount of time Mateusz had been completely submerged (over 2 ½ minutes) was relevant to the treatment he required, the police reported, demonstrably falsely, that Mateusz "might have been under water for [approximately] 30-60 seconds." This misinformation was duly noted in the Emergency Department record. The police also reported, demonstrably falsely, that "Police dove in to pull [patient] out," and that Mateusz had "charged a L[aw] E[nforcement] O[fficer]" before walking into the pool for the final time. On information

[5]Mateusz seeks no damages for his broken ribs. They are referenced solely to highlight the desperation of the police to save the life of someone they had let drown before their eyes.

and belief, defendant police officers made these false statements to minimize their own culpability for the drowning they had permitted to happen in front of their eyes.

53. Mateusz remained in the hospital's Heart and Vascular Institute until June 8, 2016. He was then transferred to the psychiatric unit, where he was found to be suffering from moderate thought disorganization, delusions and paranoia, with only scattered memories of his psychotic experiences here at issue. He was diagnosed with bipolar disorder, with psychosis in his most recent episode.

54. Mateusz remained in the psychiatric unit until being discharged from the hospital on June 14, 2016, following apparent resolution of his psychosis. He promptly returned to Poland with his father, who had arrived from Poland to aid his son. His bipolar diagnosis has since been confirmed and treated in Poland.

55. The actions and inaction of the defendant police officers set forth above are shocking to the conscience. The officers acted in gross derogation of their professional training and obligations and in a grossly negligent, wanton, willful, and reckless manner. They violated Mateusz's rights to be secured from harm, even at his own hands, in circumstances where they controlled everything about the event, were aware that Mateusz was mentally unstable and unable to safeguard himself, and prevented others from coming to his aid.

56. The actions of defendant Brooks in abiding by the defendant police officers' directions not to save Mateusz, as set forth above, and specifically his failure to act to extract Mateusz from the pool after thirty seconds of Mateusz's not resurfacing from his third submersion in the pool, were negligent, in derogation of his training and professional and legal obligations.

57. As a result of defendants' malfeasance complained of herein, Mateusz suffered grievous physical and mental injury, grave ongoing emotional distress, an enormous hospital bill, and other damages.

Causes of Action

Count I: Defendant Police Officers

Substantive Due Process Violation: Conscience-Shocking Malfeasance

58. By their actions set forth above, defendant police officers acted in a manner shocking to the conscience by failing to safeguard Mateusz from severe and obvious harm at his own hands, given his recognized mental incapacity, notwithstanding that they:

* had exclusive control and authority over Mateusz and his circumstances,
* had sole and complete control of the venue,
* prevented third parties from coming to Mateusz's aid,
* understood the various and escalating risks Mateusz was facing,
* understood Matuesz's inability to safeguard himself, and
* were fully capable of preventing Mateusz from injuring himself,

all in violation of the substantive due process clause of the Fourteenth Amendment.

Count II: Defendant Police Officers

Substantive Due Process Violation: Arbitrary and Capricious Assertion of Police Powers

59. By their actions set forth above, defendant police officers asserted their police powers in an arbitrary and capricious manner in that even as they failed to rescue Mateusz, they

denied third parties, including a competent lifeguard, the capacity to save Mateusz before he was clinically dead, in violation of the substantive due process clause of the Fourteenth Amendment.

Count III: Defendant Police Officers

Substantive Due Process Violation: State Created Danger

60. By their actions set forth above, defendant police officers, having exclusive control and authority over Mateusz and his circumstances and of the venue, knowingly acted in a manner that created or increased the obvious risk that Mateusz would suffer extreme the self-harm that then proceeded to occur in front of their eyes, in violation of the substantive due process clause of the Fourteenth Amendment.

Count IV: Defendant Police Officers

Violation of Fourth Amendment: Unreasonable Seizure of the Person

61. Should it be found that as of the time the police secured the pool area and isolated and contained Mateusz, he was not free to leave pending police assessment of whether, pursuant to *Code of Va.* §37.2-808(F), he presented a risk of harm to himself or others sufficient to permit his detention and transportation for appropriate assessment and possible treatment, and should it therefore be found that Mateusz was thereby seized within the meaning of the Fourth Amendment, then the actions subsequently taken and not taken by the defendant police officers to safeguard Mateusz from self-harm as set forth above amounted to a grossly unreasonable seizure of his person, in violation of his rights under the Fourth Amendment.

Count V: Defendant Police Officers

Gross Negligence

62. By their actions and inaction as set forth above, including specifically taking no readily available steps to prevent Mateusz, who was visibly mentally impaired, from severely harming himself, and then doing nothing to help Mateusz until he was clinically dead as a result of drowning before their eyes in eight feet of water, the defendant police officers were grossly negligent, resulting in serious injury to Mateusz.

Count VI: Defendant Brooks

Negligence

63. In failing to act other than to abide by the immoral, unprofessional, unlawful and irresponsible directions from the defendant police officers that he not enter the pool to save Mateusz – who he understood could not swim – until Mateusz had altogether stopped moving at the bottom of the pool, all as set forth above, defendant Brooks acted in negligent disregard of his training and professional and legal responsibilities as a lifeguard at the Riverside Apartments pool, resulting in serious injury to Mateusz.

Count V: Defendant American Pool, Inc.: *Respondeat Superior*

64. Defendant American Pool, Inc. is liable for the damages caused by the negligence of its employee defendant Brooks set forth above, pursuant to the doctrine of *respondeat superior*.

*

Wherefore, Mateusz requests an order of this awarding him:

* His actual damages and punitive damages against the defendant police officers appropriate to the proof at trial, jointly and severally,
* His actual damages against defendants Brooks and American Pool, Inc. appropriate to the proof at trial,
* His reasonable attorney's fees and costs awarded against the police, and
* Such other relief as is just.

Mateusz requests trial by jury.

Respectfully submitted,

MATEUSZ FIJALKOWSKI,

By counsel

Dated: April 27, 2018

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