

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 )

Case # 1:18-cv-\_\_\_\_\_ 1:18-cv-492-TSE/MSN

COMPLAINT

and )  
 )  
W. MULHERN )  
 )  
and )  
 )  
M. ZESK )  
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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, 2<sup>nd</sup> 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.<sup>1</sup> 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.

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<sup>1</sup>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.<sup>2</sup> 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

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<sup>2</sup>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.<sup>3</sup>

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

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<sup>3</sup>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/Iv51uuG-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 Mateusz 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.<sup>4</sup>

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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<sup>4</sup>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.<sup>5</sup>

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

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<sup>5</sup>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 Mateusz'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*.

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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

Counsel for Plaintiff:

//s// Victor M. Glasberg

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FijalkowskiMateusz\Pleadings\Complaint

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