

Case No. 22-1681

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

HOWARD T. LINDEN, as Personal Representative
of the Estate of Timesha Beauchamp,

Plaintiff-Appellant,

v.

CITY OF SOUTHFIELD, MI; MICHAEL STORMS;
SCOTT RICKARD; PHILLIP MULLIGAN;
JAKE KROLL,

Defendants-Appellees.

Appeal from the United States District Court
Eastern District of Michigan
Case No. 2:20-cv-12738

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

**** ORAL ARGUMENT REQUESTED ****

**CERTIFICATE OF COMPLIANCE/CERTIFICATE OF SERVICE
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS**

Fieger, Fieger, Kenney & Harrington, P.C.

Geoffrey N. Fieger (P30441)
Robert G. Kamenec (P35283)
James J. Harrington, IV (P65351)
Attorneys for Plaintiff-Appellant
19390 W 10 Mile Road
Southfield, MI 48075
(248) 355-5555
g.fieger@fiiegerlaw.com
r.kamenec@fiiegerlaw.com
j.harrington@fiiegerlaw.com

CORPORATE DISCLOSURE

Pursuant to Sixth Circuit Rule 26.1, Plaintiff-Appellant, makes the following disclosures:

1. Are any of said Parties a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal, which has a financial interest in the outcome?

No.

/s/ Robert G. Kamenec
Robert G. Kamenec

DATED: November 17, 2022

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

As provided in Sixth Circuit Rule 34(a), Plaintiff-Appellant Howard T. Linden, as Personal Representative of the Estate of Timesha Beauchamp requests this Court docket this appeal for oral argument. Justice Brennan stated “oral argument is the absolutely indispensable ingredient of appellate advocacy. . . . [O]ften my whole notion of what a case is about crystallizes at oral argument.” Robert L. Stern, *Supreme Court Practice*, p. 671 (2002) quoting Brennan in *Harvard Law School Occasional Pamphlet No. 9*, 22-23 (1967). Justice Ginsburg explained that oral argument gives counsel “notice and a last clear chance to convince the Court concerning points on which the decision may turn.” *Id.*, quoting Ginsburg, *Address to the Dinner of American Law Institute*, 58 (5/19/94).

JURISDICTIONAL STATEMENT

Plaintiff-Appellant appeals from: (1) the district court's Opinion and Order which granted in part Defendants' Motion to Dismiss and declined to exercise supplemental jurisdiction over Plaintiff's state law claims (R.E. 100, Opinion and Order, PageID# 2675-2691); and (2) the resulting Judgment (R.E. 101, Judgment, PageID# 2692), each entered July 5, 2022. Pursuant to Fed. R. App. P. 4(a)(1)(A), Plaintiff's Notice of Appeal was timely filed within 30 days of entry of the Judgment, on August 1, 2022 (R.E. 102, Notice of Appeal, PageID# 2693-2713).

The district court had jurisdiction pursuant to 28 U.S.C. §1331 (Federal Question) given the allegations made under 42 U.S.C. §1983. This Court has jurisdiction pursuant to 28 U.S.C. §1291 (Final Decisions of District Courts).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. WHETHER THE DISTRICT COURT ERRED IN DENYING PLAINTIFF’S MOTION FOR LEAVE TO AMEND TO ADD A SPECIFIC CLAIM OF “STATE CREATED DANGER” TO THE EXISTING COMPLAINT, UPON DETERMINING THAT THE PROPOSED AMENDED CLAIM IS FUTILE UNDER FED. R. CIV. P. 15 AND THE INTERPRETIVE CASE LAW?

Plaintiff-Appellant says “yes.”

Defendants-Appellees say “no.”

- II. WHETHER THE DISTRICT COURT ERRED WHEN GRANTING IN PART DEFENDANTS’ MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6), INCLUDING BUT NOT LIMITED TO THE DISTRICT COURT’S DETERMINATION THAT PLAINTIFF’S THIRD AMENDED COMPLAINT WAS FUTILE?

Plaintiff-Appellant says “yes.”

Defendants-Appellees say “no.”

- III. WHETHER THE DISTRICT COURT ERRED IN DISMISSING THE CASE BASED ON QUALIFIED IMMUNITY?

Plaintiff-Appellant says “yes.”

Defendants-Appellees say “no.”

STATEMENT OF THE CASE

A. Introduction.

This is a civil rights case brought pursuant to 42 U.S.C. §1983. In her proposed Third Amended Complaint (“TAC”), Plaintiff-Appellant¹ adequately alleged facts under the “state-created danger” exception to support a claim that Defendants-Appellees² deprived Timesha of her Fourteenth Amendment due process rights when they erroneously declared her deceased, preventing her from receiving any further “timely” treatment and subjecting her to a private act of violence of undergoing funeral home processes, including being put in a body bag while still alive. Defendants’ actions were intentional, or deliberately indifferent to her constitutional rights. Thus, Plaintiff adequately pled facts supporting a viable constitutional violation by Defendants that was clearly established at the time.

Both the magistrate judge and the district court improperly rejected Plaintiff’s TAC as “futile.” In turn, Defendants were not entitled to qualified immunity for lack of a constitutional right pled, or otherwise, and their motion to dismiss should have been denied. The district court failed to adequately consider

¹ Howard Linden, as Personal Representative of the Estate of Timesha Beauchamp, hereinafter “Plaintiff” unless otherwise designated.

² City of Southfield, hereinafter “City,” and Michael Storms, Scott Rickard, Phillip Mulligan, and Jake Kroll, hereinafter “First Responders” (collectively, “Defendants”), unless designated otherwise.

earlier factual allegations of the TAC, incorporated into the Count sought to be added via amendment, Count IV, resulting in an erroneous futility ruling.³

The district court also required a factual allegation that the Plaintiff's family members attempted to obtain additional medical aid, even though the state created danger allegation involves the First Responders preventing the family members from doing so. In Plaintiff's view, this ruling is reduced to the untenable proposition that a state created danger plaintiff must allege activity that is futile because it was prevented by the very state action challenged (query, if an activity is alleged to be prevented, how or why must the activity be attempted since, in the first instance, it was prevented?). The district court also determined – without support – Timesha Beauchamp was a no greater danger after than before the activities of the Defendant First Responders who are alleged to have willfully given improper medical information to Dr. Darr seeking to prematurely discontinue life-saving aid, and who otherwise prematurely and erroneously decided that Timesha was deceased, even though Timesha was left untreated medically for over 4½ hours. Whether Timesha's medical condition deteriorated during those for 4½ hours is the quintessential question of fact governed by medical testimony. In turn, whether medical treatment earlier provided – the delay in treatment caused by the

³ References to the district court's finding apply equally and include challenges to the magistrate judge's Order.

First Responders' unceasing assurances to the family members that Timesha had died, notwithstanding clinical signs to the contrary – placed Timesha in greater danger after the activities of the First Responders is a matter of evidence, not to be decided on a motion to amend.

The district court also failed to recognize and adequately credit the “private act of violence” of the funeral director placing Timesha in a body bag and wrapping her in a sheet for transport to the funeral home, while Tamisha was still alive and in distress, as specifically alleged in several paragraphs of the TAC.

B. Facts Relevant to the Issues Submitted for Review.⁴

1. The allegations found in the Second Amended Complaint.

On August 23, 2020 at or around 7:27 a.m., Timesha Beauchamp's mother Erika Lattimore called 911 when she discovered Timesha unresponsive upon entering her room to give Timesha her daily medication. (R.E. 55, PageID# 1680). The First Responders arrived and observed Timesha on her bed unresponsive and they began CPR compressions. At 7:48 a.m. the capnography showed a reading

⁴ The district court resolved this case under Fed. R. Civ. P. 12(b)(6), which requires Plaintiff's factual allegations be taken as true. Given that the district court and the magistrate judge found that Plaintiff's TAC was futile, this Statement of Facts is taken from Plaintiff's SAC, which is the basis for Plaintiff's TAC, the latter containing the added Count IV. Paragraphs 15-71 of the SAC and TAC are identical.

indicating that Timesha still had air movement in her lungs. *Id.* at ¶26, PageID# 1681. At 8:03 a.m., the First Responders discontinued CPR and declared Timesha deceased prior to obtaining physician permission to discontinue efforts. *Id.* at ¶29, PageID# 1682. The cardiac monitor showed that CPR was discontinued at 8:04 a.m. despite the monitor showing electrical activity. *Id.* at ¶30.

At 8:09 a.m., Defendant Michael Storm called a doctor at Ascension Providence Southfield Hospital to obtain permission to discontinue resuscitative efforts. *Id.* at ¶32. Mr. Storm advised the doctor at Ascension Providence Southfield Hospital, Dr. Darr, that Timesha did not have any rhythm change which was untrue. *Id.* at ¶33. The First Responders had not attempted to verify circulation or respiration by auscultation despite the CO2 level indicating respiration by the Timesha. *Id.* at ¶34. Even as the First Responders, and certain officers from the Southfield Police Department were packing up their equipment, numerous family members of Timesha alerted them multiple times that Timesha was still breathing and had a pulse. Every time, despite the monitor showing that Timesha still had organized electrical activity indicating that she was not dead, the First Responders informed the family that Timesha was indeed deceased, and that her body was merely reacting to the medication that was given to her. *Id.* at ¶¶39, 41, PageID# 1683. A Southfield Police Officer then gave Ms. Lattimore the medical examiner number declaring Timesha's death, instructing her to provide the

medical number to the funeral home of her choice upon their arrival to pick up Timesha. *Id.* at ¶¶44-47, PageID# 1684.

Ms. Lattimore called James H. Cole Funeral Home who sent their contractor, Holmes Removal Services. When Leslie Holmes with Holmes Removal Services arrived at 11:25 a.m., he asked Ms. Lattimore if in fact Timesha was deceased as even he observed Timesha's chest moving. *Id.* at ¶49, PageID# 1685. Ms. Lattimore assured him that she was, repeating the incorrect information that had been relayed to her by the First Responders that it was the medication that had been given to her causing her to move. *Id.* at ¶50. Relying on that information, Mr. Holmes then wrapped up Timesha's body placing her, alive, unbeknownst to him, into a body bag and transporting Timesha to the funeral home to process Timesha's body for funeral services. *Id.* at ¶¶50-52. Mr. Holmes arrived at the James H. Cole Funeral Home around 11:40 a.m., and Mr. Holmes and Steven Shaw, the embalmer for the funeral home unzipped the body bag to find Timesha with her eyes open, her chest moving up and down, and gasping for air. *Id.* at ¶¶52-53, PageID# 1685. Mr. Shaw called 911, as well as Ms. Lattimore, and Timesha was immediately rushed to Sinai Grace Hospital where doctors there confirmed that she was very much alive. *Id.* at ¶¶54-58, PageID# 1685-1686. Unfortunately, by this time she was suffering from a significant anoxic brain injury and placed on a ventilator in the ICU. *Id.* at ¶58, PageID# 1686.

On August 30, 2020, Timesha was moved from Sinai Grace Hospital to Children's Hospital and continued to be on a ventilator in a vegetative state. *Id.* at ¶¶67-69, PageID# 1688. Timesha died on October 18, 2020. *Id.*

2. The new allegations found in the Third Amended Complaint.

There are two important portions of the TAC affecting the propriety of the grant of leave to amend. The first is the proposed added Count IV, entitled "42 U.S.C. §1983-State Created Danger." The second is the previously asserted factual allegations of the Third Amended Complaint, echoing those in the SAC "Factual Statement," in which ¶¶15-71 of the SAC are repeated verbatim in the corresponding ¶¶15-71 of the TAC, incorporated by reference in Count IV (¶98). Each portion is explained in the following paragraphs.

a. Count IV-State Created Danger.

The operative Paragraphs of Count IV for which the TAC amendment was sought are as follows:

99. At all times relevant hereto, that the Defendants, STORMS, RICKARD, MULLIGAN and KROLL, were acting under the color of state law and created a state created danger by substantially increasing the risk of harm to TIMESHA.

100. At all times relevant hereto, that the Defendants, STORMS, RICKARD, MULLIGAN and KROLL's, decision to discontinue CPR and pronounce TIMESHA deceased prior to obtaining permission to discontinue efforts was an affirmative act that created a state created danger by substantially increasing the risk harm to TIMESHA.

101. At all times relevant hereto, that the Defendants, STORMS, RICKARD, MULLIGAN and KROLL's, decision to willfully misrepresent medical data about TIMESHA to Dr. Darr, information he relied on when giving his consent to cease CPR efforts, was an affirmative action that created a state created danger that substantially increased the harm to TIMESHA because it created a situation where all medical aid to TIMESHA was stopped.

102. At all times relevant hereto, that the Defendants, STORMS, RICKARD, MULLIGAN and KROLL, actions exposed TIMESHA to a special danger because their actions prevented TIMESHA from receiving any further medical aid, placing her specifically at risk.

103. At all times relevant hereto, that the Defendants, STORMS, RICKARD, MULLIGAN and KROLL, knew that their actions specifically endangered TIMESHA.

104. At all times relevant hereto, that the Defendants, STORMS, RICKARD, MULLIGAN and KROLL, despite knowing the danger in which their actions placed TIMESHA, acted with deliberate indifference to this danger by pronouncing TIMESHA deceased despite the multiple signs to the contrary i.e. the cardiac monitor showing normal levels of CO2, her chest moving up and down, a pulse, etc.

106. At all times relevant hereto, that Defendants, STORMS, RICKARD, MULLIGAN, and KROLL, actions created a state created danger that substantially increased the risk of harm to TIMESHA in violation of 42 U.S.C. §1983.

107. Defendants, STORMS, RICKARD, MULLIGAN, and KROLL are not entitled to governmental or qualified immunity.

(R.E. 81-5, TAC, ¶¶ 99-107, PageID# 2382-2385).

b. Factual allegations incorporated in Count IV.

Consistent with the three-state created danger elements, the following allegations, each previously pled in the Second Amended Complaint, were repeated in the TAC, grouped according to each element. *First*, an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party:

29. At approximately 8:03 a.m., Defendants, STORMS, RICKARD, MULLIGAN, and KROLL discounted CPR and declared TIMESHA deceased prior to obtaining permission to discontinue efforts.

30. The cardiac monitor showed that CPR was discontinued at 8:04 a.m. despite the monitor showing electrical activity and showing normal levels of exhaled CO₂.

32. At approximately 8:09 a.m., Defendant, STORMS, called Dr. Darr at Ascension Providence Southfield Hospital to obtain permission to discontinue resuscitative efforts five minutes after resuscitative efforts had ceased.

33. Defendant, STORMS, advised Dr. Darr that TIMESHA did not have any rhythm change and was asystole throughout the entire resuscitation, which was untrue.

34. At no point did Defendants, STORMS, RICKARD, MULLIGAN and KROLL, attempt to verify circulation or respiration by auscultation despite the CO₂ level indicating respiration by the TIMESHA.

38. Despite clearly seeing organized electrical activity Defendants, STORMS and KROLL, informed the family that TIMESHA's body was reacting to medication that was given to her, and that she was dead.

41. Defendants, STORMS, RICKARD, MULLIGAN and KROLL, advised TIMESHA's family that there would be chest movement due to the medication given but that TIMESHA was in fact dead.

42. Defendants, STORMS, RICKARD, MULLIGAN and KROLL, refused to respond to the family's plea for medical attention even though TIMESHA was still alive.

(R.E. 81-5, TAC, PageID# 2364-2366).

Second, the allegation of a specific danger to Plaintiff wherein the state's actions placed Plaintiff specifically at risk, as follows:

29. At approximately 8:03 a.m., Defendants, STORMS, RICKARD, MULLIGAN, and KROLL discounted CPR and declared TIMESHA deceased prior to obtaining permission to discontinue efforts.

32. At approximately 8:09 a.m., Defendant, STORMS, called Dr. Darr at Ascension Providence Southfield Hospital to obtain permission to discontinue resuscitative efforts five minutes after resuscitative efforts had ceased.

33. Defendant, STORMS, advised Dr. Darr that TIMESHA did not have any rhythm change and was asystole throughout the entire resuscitation, which was untrue.

Id., PageID# 2364.

The "private act of violence" allegations included in ¶¶48-53:

48. At approximately 9:00 a.m., Ms. Lattimore called James H. Cole Funeral Home who sent their contractor, Holmes Removal Services to pick up TIMESHA's body.

49. At all times relevant, Leslie Holmes with Holmes Removal Services arrived at 11:25 a.m. to pick up TIMESHA's body and asked Ms. Lattimore if in fact TIMESHA was deceased due to observing TIMESHA's chest moving.

50. Ms. Lattimore informed Mr. Holmes that she was advised by Defendants that TIMESHA's body would move due to the medication administered but that she in fact was dead and provided Holmes the medical examiner case number she was given.

51. Mr. Holmes wrapped up TIMESHA's body in the sheet she was laying in and placed her into the body bag before escorting her out of the home for transport to the funeral home.

52. TIMESHA was then transported to James H. Cole Funeral Home to process her body for funeral services.

53. Upon information and belief, TIMESHA arrived at James H. Cole Funeral Home approximately at 11:40 a.m., at which time, Mr. Holmes and Steven Shaw, the embalmer for the funeral home, unzipped the body bag and saw TIMESHA with her eyes open, her chest moving up and down, and gasping for air.

Id., PageID# 2366-2367.

Third, the allegations that Defendants state knew or should have known that its actions specifically endanger the Plaintiff:

33. Defendant, STORMS, advised Dr. Darr that TIMESHA did not have any rhythm change and was asystole throughout the entire resuscitation, which was untrue.

37. Defendant, STORMS, placed the monitor back on TIMESHA, at which time the monitor clearly showed that TIMESHA still had organized electrical activity indicating she was not dead.

38. Despite clearly seeing organized electrical activity Defendants, STORMS and KROLL, informed the family that TIMESHA's body was reacting to medication that was given to her, and that she was dead.

43. At all times relevant Defendants, STORMS, RICKARD, MULLIGAN and KROLL, had enough information that Plaintiff

TIMESHA BEAUCHAMP was suffering from an emergency medical condition requiring immediate medical attention.

Id. at PageID# 2364-2366. There are additional allegations in the proposed TAC which reflect other elements of the cause of action, including the requisite state culpability to establish a due process violation.⁵

⁵ 34. At no point did Defendants, STORMS, RICKARD, MULLIGAN, and KROLL, attempt to verify circulation or respiration by auscultation despite the CO2 level indicating respiration by TIMESHA.

35. While Defendants, STORMS, RICKARD, MULLIGAN and KROLL were packing their items away into the ambulance, a family member called out to Defendants to inform them that TIMESHA was still breathing and that she had felt a pulse.

37. Defendant, STORMS, placed the monitor back on TIMESHA, at which time the monitor clearly showed that TIMESHA still had organized electrical activity indicating she was not dead.

38. Despite clearly seeing organized electrical activity Defendants, STORMS and KROLL, informed the family that TIMESHA's body was reacting to medication that was given to her, and that she was dead.

39. As Defendants, STORMS, RICKARD, MULLIGAN and KROLL, proceeded to leave the driveway, a Southfield police officer stopped Defendants as the family was stating TIMESHA was still breathing.

40. Defendants STORMS, RICKARD, MULLIGAN and KROLL went back into TIMESHA's bedroom for a third time where family members informed them that she could feel a pulse and that TIMESHA had gasped for air.

41. Defendants, STORMS, RICKARD, MULLIGAN and KROLL, advised TIMESHA's family that there would be chest movement due to the medication given but that TIMESHA was in fact dead.

(cont'd next page)

C. Relevant Procedural History.

This action commenced on October 8, 2020, with the filing of Plaintiff's original Complaint (R.E. 1, Complaint, PageID# 1-22). On the same day, Plaintiff filed her First Amended Complaint (no new parties added) in which certain state law claims were added (R.E. 2, First Amended Complaint, PageID# 23-49). On December 7, 2020, Plaintiff moved to file a Second Amended Complaint, as required by Fed. R. Civ. P. 17 for substitution of party (Timesha Beauchamp had died) (R.E. 13, Motion for Leave to File SAC, PageID# 95-215), which was granted by way of an order dated March 17, 2021 (R.E. 54, Order Granting Motion for Leave to File Second Amended Complaint, PageID# 1674-1675). The Second Amended Complaint was filed the same day (R.E. 55, Second Amended Complaint, PageID# 1676-1702).⁶

For the Court's convenience, here are the district court filings relevant to the appeal:

(cont'd from previous page)

(R.E. 81-5, PageID# 2364-2365).

⁶ The allowance of the Second Amended Complaint mooted the intervening Motion for Judgment on the Pleadings filed by Defendants (R.E. 50, Motion for Judgment on the Pleadings, dated March 12, 2021, PageID# 1537-1599).

- March 29, 2021, Defendants' Motion to Dismiss under Rule 12(b)(6) together with attachments 1-4 (R.E. 64, Motion to Dismiss, PageID# 1988-2061);
- April 29, 2021, Plaintiff's Response to the Motion to Dismiss (R.E. 76, Response to Motion to Dismiss, PageID# 2206-2233);
- May 3, 2021, Defendants' Reply (R.E. 79, Reply, PageID# 2247-2252).
- May 18, 2021, Plaintiff's Motion for Leave to File Third Amended Complaint (R.E. 81, PageID# 2257-2390);
- May 18, 2021, Plaintiff's Proposed Third Amended Complaint and Demand for Jury Trial (R.E. 81-5, PageID# 2358-2387);
- June 1, 2021, Defendants' Response to Plaintiff's Motion for Leave to File Third Amended Complaint (R.E. 86, PageID# 2424-2442);
- June 8, 2021, Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Leave to File Third Amended Complaint (R.E. 88, PageID# 2445-2453);
- July 21, 2021, Plaintiff's Supplemental Brief Regarding Applicability of New Authority on the State-Created Danger Exception (R.E. 91, PageID# 2475-2521);
- August 4, 2021, Defendants' Supplemental Brief Regarding Applicability of New Authority on the State-Created Danger Exception (R.E. 92, PageID# 2522-2535);
- On November 17, 2021, virtual video proceeding before the magistrate judge on the motion for leave to file third amended complaint (*see* docket entry between ECF Nos. 96 and 97);
- January 26, 2022, magistrate judge entered the Order Denying Plaintiff's Motion for Leave to Amend (ECF No. 81) (R.E. 97, Order Denying Leave, PageID# 2544-2574);

- February 9, 2022, Plaintiff's Objection to Order Denying Plaintiff's Motion for Leave to Amend (ECF No. 81) (R.E. 98, Objection, PageID# 2575-2660 [with exhibits]);
- February 23, 2022, Defendants' Response to Objections (R.E. 99, Response to Objections, PageID# 2661-2674);
- July 5, 2022, the district court's Opinion and Order Overruling Plaintiff's Objection, Granting in Part Defendant's Motion to Dismiss, and Declining to Exercise Supplemental Jurisdiction Over Plaintiff's State Law Claim (R.E. 100, PageID# 2675-2691);
- July 5, 2022, the district court's Judgment (R.E. 101, PageID# 2692);
- August 1, 2022, Plaintiff's Notice of Appeal filed with the district court (R.E. 102, PageID# 2693-2713).

This appeal followed.

D. Rulings Presented for Review.⁷

The district court found that Plaintiff's TAC would be futile because Plaintiff could not satisfy the "Private Act of Violence" requirement of the state created danger doctrine (R.E. 100, Opinion and Order, pp. 8-10, PageID# 2682-2684). Relying primarily upon an analogy to this Court's decision in *Willis v. Charter Twp. of Emmett*, 360 F. App'x. 596 (6th Cir. 2010), the district court found

⁷ The district court reviewed *de novo* the findings of the magistrate judge (R.E. 100, Opinion and Order, PageID# 2681). To the extent there is an objection posed to this ruling, or this Court reviews differently the Order versus Report and Recommendation issue, the magistrate judge's order is incorporated by reference and similarly challenged as incorrect (R.E. 97, Order Denying Plaintiff's Motion for Leave to Amend (ECF No. 81), PageID# 2544-2574).

that Timesha was experiencing a medical emergency prior to the First Responders' arrival and, even though left untreated and prematurely prepared for funeral processing after the First Responders declared her deceased, there was no private act of violence:

[T]o hold that these circumstances amount to private acts of violence would turn the general rule – that state actors have no constitutional duty to render competent medical services or rescue services – on its head.

Id. at p. 10, PageID# 2684. The district court concluded that, “Thus, Plaintiff’s proposed third amended complaint does not state a claim under the first approach to the state created danger exception.” *Id.*

The district court also rejected the claim that the First Responders were cutting off or preventing further private medical aid, as another method of establishing the state created danger doctrine. Relying primarily upon *Beck v. Haik*, 2011 W.L. 1597942 (6th Cir. 2000), the district court found no allegation that the First Responders disallowed family members and other sources of private aid to render medical care (*Id.* at pp 11-12, PageID# 2685-2686).

In fact, the First Responders were summoned twice after they had initially left because family members observed signs of life on Timesha. Despite the First Responders providing misinformation to Dr. Darr and erroneously insisting that Timesha was deceased, family members could have sought help from private sources but did not do so.

Id. at 12, PageID# 2686. The district court concluded that, “Thus, Plaintiff’s proposed third amended complaint does not state a claim for a constitutional violation based on cutting off private aid under *Beck* and its progeny.” *Id.*

The district court rejected Plaintiff’s position that the magistrate judge had improperly applied a Fed. R. Civ. P. 56, rather than a Rule 12(b)(6) standard, without explanation, stating that even if this were true, the allegations in the proposed TAC were, taken as true in the light most favorable to Plaintiff, did not state a claim under the state created danger doctrine. *Id.*

Finally, the district court found with respect to the state created danger allegation that the state actors’ behavior here did not amount to affirmative conduct that either created or increased the risk of harm since Timesha was already experiencing a medical emergency prior to the First Responders’ arrival. *Id.* at 12-13, PageID# 2686-2687.

With respect to qualified immunity, the district court characterized Plaintiff’s due process claim as one of providing incompetent medical aid, insufficient to bring a constitutional claim (R.E. 100, Opinion and Order, pp 15-16, PageID# 2689-2690). The district court then found that Plaintiff had not stated a constitutional claim against the City of Southfield, as a Defendant, because there

could be no liability under *Monell*⁸ without an underlying constitutional violation. *Id.* The trial court dismissed without prejudice Plaintiff's state law claims (*Id.*) and entered a corresponding Judgment on the same date, July 5, 2022 (R.E. 100, Judgment, PageID# 2692). This appeal followed.

⁸ *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

SUMMARY OF THE ARGUMENT

The district court reviewed *de novo* and left intact the magistrate judge's Order Denying Plaintiff's Motion for Leave to Amend (ECF No. 81), premised on futility (R.E. 97, Order Denying Leave to Amend, PageID# 2544-2573; R.E. 100, Opinion and Order, PageID# 2681-2687), finding it did not properly allege sufficient facts plausibly stating a state created danger claim under 42 U.S.C. §1983. The errors of both the magistrate judge and the district court are two fold, the first being the failure to consider the *entire* TAC when determining factual sufficiency, and the second being the non sequitur employed to find futility: to sufficiently assert that the First Responders prevented the family members from obtaining medical aid, it must also be asserted factually that the family members attempt to obtain the very aid which they were dissuaded from doing by the First Responders. On the first point, there are many allegations in the TAC asserting facts under which it is plausible that the First Responders "prevented" the family from seeking private medical aid. On the second point, neither law nor logic dictates that, to validly and plausibly allege that the First Responders "prevented" the family from seeking private aid, the family members were required to attempt seeking such private medical aid after being "prevented" by the First Responders from doing so. This extends the pleading standards a bridge too far by requiring

facts alleging that family members attempted the very activity prevented by the First Responders.

The district court also erred by finding that Timesha was already experiencing a medical emergency prior to the First Responders' arrival and thus was not exposed to a private act of violence as a result of their actions (R.E. 100 Opinion and Order, PageID# 2686-2687). This ruling invades the province of the jury and essentially employs the framework for deciding a motion for summary disposition under Rule 56. But the question at the pleading stage of the proceedings case was simply whether, assuming that Plaintiff can prove the allegations that he has set forth, the TAC would state a valid and plausible cause of action for state created danger.

In any event, even the SAC plausibly stated a cause of action under §1983. A fair reading of the SAC (let alone the requisite reading in the light most favorable to Plaintiff) is that the First Responders made a premature decision that Timesha had died and that, based on that conclusion, repeatedly provided unwavering affirmations to the family that because of Timesha's assumed death, there was no need for medical care to be provided. This was a tragic and incorrect conclusion. Once discovered alive, the decedent was provided treatment, but she had gone 4 hours, 37 minutes without CPR/resuscitation efforts (measured from the time CPR was discontinued, 8:03 a.m. on August 23, 2021 (§29) though 11:40 a.m., when the

funeral director unzipped the body bag and found Timesha alive, eyes wide open, chest moving up and down, gasping for air (¶¶52-53). It is a question for medical experts, rather than upon resolution on the pleadings, of whether Timesha's deteriorating condition *after* the alleged state action, created a more dangerous medical environment than *before* the state action. Finally, given the arguments in Argument I and II, a constitutional right was pled as violated and the rights so alleged are clearly established in this Circuit and nearly all of the Circuits rendering as error the application of qualified immunity.

ARGUMENT I

THE DISTRICT COURT ERRED IN DENYING PLAINTIFF’S MOTION FOR LEAVE TO AMEND TO ADD A SPECIFIC CLAIM OF “STATE CREATED DANGER” TO THE EXISTING COMPLAINT, UPON DETERMINING THAT THE PROPOSED AMENDED CLAIM IS FUTILE UNDER FED. R. CIV. P. 15 AND THE INTERPRETIVE CASE LAW.

A. Standard of review.

This Court reviews for an abuse of discretion a district court’s denial of a motion to amend. *Dillon v. Cobra Power Corp.*, 560 F.3d 591, 597 (6th Cir. 2009). Pursuant to Fed. R. Civ. P. 15(a), “leave to amend a pleading shall be given when justice so requires.” *Coe v. Bell*, 166 F.3d. 320, 341 (6th Cir. 1998) (citing *Brooks v. Celeste*, 39 F.3d. 125, 130 (6th Cir. 1994)). Rule 15(a) embodies “a liberal policy of permitting amendments to ensure the determination of claims on their merits.” *Marks v. Shell Oil Co.*, 830 F.2d. 68, 69 (6th Cir. 1987). “A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss.” *United States ex rel. Harper v. Muskingum Watershed Conservancy Dist.*, 842 F.3d 430, 440 (6th Cir. 2016) (quotation omitted). Thus, futility is limited to where the proposed amendment does not state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

When assessing the alleged futility of a proposed amendment, the focus is on whether the allegations in the proposed amended complaint could withstand a motion to dismiss, not whether the plaintiff will be able to support the allegations

with proofs. *Head v. Jellico Housing Auth.*, 870 F.2d. 1117, 1123 (6th Cir. 1989). This determination is confined to the pleadings themselves, with the assessment of the facial sufficiency of the complaint undertaken without resort to matters outside the pleadings. *Wysocki v. Int’l Bus. Mach. Corp.*, 607 F.3d. 1102, 1104 (6th Cir. 2010).

B. Plaintiff’s proposed Third Amended Complaint contains sufficient facts plausibly and validly stating a claim of “state created danger,” for which leave to amend should have been granted under the liberal provisions of Fed. R. Civ. P. 15.

1. State created danger claim against First Responders.

42 U.S.C. §1983 provides a cause of action for the deprivation of any rights, privileges, or immunities secured by the United States Constitution and law of the United States. *Wilder v. Virginia Hospital Ass’n.*, 496 U.S. 498 (1990). Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). Government officials may be held liable under section 1983 for a failure to do what is required as well as for overt activity which is unlawful and harmful. *Estelle v. Gamble*, 429 U.S. 97 (1976).

Section 1983 was designed to deter state actors from using their badge of authority to deprive individuals of their federally guaranteed rights, and to provide relief to victims if such deterrence fails. *Wyatt v. Cole*, 112 S.Ct. 1827 (1992). Section 1983 must be broadly construed to effectuate these congressional goals.

See *Golden State Transit v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Wood v. Tompkins*, 33 F.3d 600, 604 (6th Cir. 1994).

To state a claim under §1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States has been violated; and (2) that the alleged violation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

Even in non-custodial settings state officials may violate the due process clause when their affirmative action's directly increase the vulnerability of citizens to danger or otherwise place citizens in harm's way, known as the "state-created danger" exception to *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989), described by this Court in *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir.1998) as applicable where the state "cause[s] or greatly increase[s] the risk of harm to its citizens ... through its own affirmative acts."

A state-created danger claim has three elements: (1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff.' " *Jones v. Reynolds*, 438 F.3d 685, 690 (6th Cir.2006) (quoting *Cartwright v. City of Marine City*, 336 F.3d 487,

493 (6th Cir.2003)). While the first prong of the state-created danger exception, requires that the state actor “either created or increased the risk” of exposure to the acts of a third party, *Ewolski v. City of Brunswick*, 287 F.3d 492, 509 (6th Cir. 2002) notes more generally that “state officials may violate the Due Process Clause when their *affirmative actions* directly increase the vulnerability of citizens to danger or otherwise place citizens in harm's way”; “[l]iability under the state created danger theory must be predicated on the states affirmative acts which work to plaintiff's detriment in terms of exposure to danger.” *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 913 (6th Cir. 1995).

2. Preventing further medical aid.

In its Opinion and Order, the district court acknowledged case law establishing a state created danger claim where the state arbitrarily cuts off private aid despite state-sponsored aid being unavailable. (R.E. 100, Opinion and Order, pp. 8-9, PageID# 2682-2683). After an extensive discussion of this Court's decision in *Beck v. Haik*, 2000 W.L. 1597942 (6th Cir. 2000) (*Id.* at pp. 10-11, PageID# 2684-2685), the district court found “no allegation that the First Responders disallowed family members or other sources of private aid to render medical aid,” between the time the First Responders left the scene and the time the funeral home representative arrived].” *Id.* at PageID# 2686. Although as acknowledged by the magistrate judge of the allegations that the First Responders

created a situation where all medical aid to Timesha was stopped, the district court reasoned that this allegation “simply [was] not tantamount to saying the First Responders “prevented” Timesha from receiving private aid.” (R.E. 100, PageID# 2569-2570).⁹ At pages 11-12 of its Opinion and Order, the district court rejected Plaintiff’s assertions that the activities of the First Responders prevented further medical care to be rendered to Timesha:

Plaintiff avers that because the erroneous information provided by the First Responders – that Timesha was deceased and did not need medical care – dissuaded the family from even attempting to obtain private aid. . . .

Id. at PageID# 2685.

The district court misunderstood Plaintiff’s argument. Here, the First Responders affirmatively dissuaded the family from acting to obtain or request medical assistance. In ¶39 of the TAC, it was specifically alleged that the family not only repeatedly informed the First Responders that Timesha was still breathing and she had a pulse, and that she was gasping for air, but that the First Responders

⁹ The magistrate judge continued:

But the mere providing of incorrect medical information, even “willfully” or on more than one occasion, does not equate to actually “preventing” others, including the recipient of that information, from providing aid.

Id. at PageID# 2572, citing *Gooden*, 2021 W.L. 2389727, at *7.

were stopped by a Southfield Police Officer who informed the First Responders that the family was stating Timesha was still breathing:

31. At approximately 8:07 a.m., officers with the Southfield Police Department arrived at Ms. Lattimore's home.

* * *

39. As Defendants STORM, RICKARD, MULLIGAN AND KROLL, proceeded to leave the driveway, a Southfield police officer stopped Defendants as the family was stating Timesha was still breathing.

(R.E. 81-5, proposed TAC, PageID# 2364-2365). From these allegations, it can be reasonably inferred that not only did the First Responders dissuade the family members from obtaining further medical attention for Timesha, but also that a Southfield police officer was dissuaded from doing the same. This is a point that is not addressed – or inadequately addressed – in the district court's Opinion and Order. By dissuading not only the family members, but also the Southfield police, this increased the chances that Timesha would be processed by the funeral home as a deceased person, which is exactly what happened here. The court must draw all reasonable inferences in favor of Plaintiff when assessing whether the facts in the TAC demonstrate a state-created danger. *Cahoo v. SAS Analytics, Inc.*, 912 F.3d 887, 897 (6th Cir. 2019); *Lipman v. Budish*, 974 F.3d 726, 746 (6th Cir. 2020).

The proposed TAC contains multiple allegations that the family members sought to intervene for additional medical attention (R.E. 98-3, ¶¶35-40, PageID#

2637-2638) but that Defendants had advised that Timesha was already deceased (§§41-42, PageID# 2638-2639). Defendants had decided to discontinue CPR and pronounced Timesha deceased prior to obtaining permission to discontinue such efforts (§100, PageID# 2655), culminating in the allegation that the Defendants willfully misrepresented medical data about Timesha to Dr. Darr, information upon which Dr. Darr relied (§101, PageID# 2656). Then, most importantly, it is alleged in that factual context that the Defendants affirmatively dissuaded the family from acting to obtain private medical aid, as reflected in §§35-40, 41-42, PageID# 2637-2638, and §100, PageID# 2638-2639. When all of the operative paragraphs of the proposed TAC are read in context, it is plausibly pled that Timesha's family tried to intervene on her behalf for additional medical attention, that the family members were consistently advised by Defendants that Timesha was deceased, and that the family members were accordingly dissuaded from seeking additional and private medical care (the very medical care that was provided once it was determined at the funeral home that Timesha was indeed alive). Taken from the allegation that the First Responders "willfully" provided incorrect medical information to Dr. Darr, it can be factually inferred that at that earlier time, had the correct medical information been provided by either Dr. Darr or another medical practitioner, additional medical we could have been provided to Timesha. Again, it should not

be lost on the Court that such aid was provided once it was determined that Timesha was indeed alive.

The district court's reasoning is reduced to the novel proposition that, to factually allege preventing the family members from seeking additional and private medical care, there must be an allegation that that medical care was attempted and was unavailable. Restated, to properly allege prevention, there must be an attempt at the very activity that was prevented. This turns the meaning of prevention on its head. To prevent is to deprive one of power or hope of acting or succeeding in a certain manner. *Webster's Ninth New Collegiate Dictionary*, p. 933 (1983). Therefore, something prevented need not be something attempted (otherwise that "something" is not really prevented). Yet, the district court required a factual allegation that such private aid was indeed attempted – notwithstanding the allegation that the First Responders dissuaded (and thus prevented) the same. The case law does not go as far as to require an attempt to take the very act which the state actors had prevented.

The case law cited by the district court (with its reliance on the magistrate judge's Order) does not support the denial of leave to amend on the basis of futility. The district court relied on this Court's decision in *Jackson v. Schultz*, 429 F.3d 586, 591-592 (6th Cir. 2005), for the proposition that "the EMTs did not discourage others from entering the ambulance." *Jackson* involved a shooting victim being

placed in an ambulance. There was no evidence that the EMTs discouraged others from entering the ambulance, and no evidence of any private resource available or attempted. In contrast, here it is alleged factually that by misrepresenting the decedent's medical condition, combined with dissuading the family from seeking medical care, the private medical aid was cut off.

In *Beck*, police threatened to arrest private search and rescue divers at the scene of drowning and otherwise failed to provide state divers. In discussing the proper jury instructions, the *Beck* court found proper an allegation that there was a policy preventing private rescue elements. There was no requirement that the *Beck* plaintiff family members actually attempt to employ private search and rescue divers, as found necessary here by the Magistrate Judge.

In *Gooden v. Batz*, 2020 W.L. 6146395, at *7 (S.D. Ohio), paramedics incorrectly concluded that the plaintiff involved in a vehicle collision did not survive the accident. It was determined one hour later that plaintiff was moving and had a pulse. It was alleged that the defendants failed in their evaluation of the plaintiff to use “basic SALT” techniques,¹⁰ resulting in a sheet erroneously placed over the plaintiff, allegedly preventing persons “on site” from providing assistance. *Id.* at *3. The *Gooden* court granted a motion for judgment on the pleadings

¹⁰ (Sort, Assess, Life-Saving, Treatment/Transport procedure).

because the plaintiff did not plead facts plausibly indicating that the paramedics knowingly created or increased the danger that the plaintiff, Mr. Gooden, would be exposed to private acts of violence. The *Gooden* court held specifically:

Here, there is no allegation that the paramedics stopped any specific first responder, bystander, or passerby from checking Mr. Goodman.

Id. at *7.

In contrast, here there are multiple allegations, supported by factual assertions, that Defendants decided to discontinue CPR, pronounced Timesha deceased prior to obtaining permission to discontinue such efforts (§100) and in so doing, willfully misrepresented medical data about Timesha to Dr. Darr, information upon which he relied (§101) and affirmatively dissuaded the family from acting (§§35-40; 41-42; 100). These factual allegations are the equivalent of what was missing in *Gooden*: the First Responders stopped (“prevented”) the family members from obtaining medical aid for Timesha.

In summary, none of the cases cited reflects the factual allegations as in this case.

3. Affirmative acts.

This Court has recognized that where affirmative acts create or enhance a danger of violence perpetuated by a third party, there is a state-created danger case. *Kallstrom, supra*. While this Court has not specifically ruled on whether affirmative misrepresentations and concealment are affirmative acts, other courts

have found that they are affirmative acts in a state-created danger analysis. *See, e.g., Kuyper v. Bd. of Cty. Comm'rs of Weld Cty.*, No. 09-cv-342, 2010 W.L. 1287534, at *6 (D. Colo. Mar. 30, 2010) (finding that affirmative misrepresentations were affirmative acts in a state-created danger analysis); *Briscoe v. Potter*, 355 F.Supp.2d 30, 44 (D.D.C. 2004) (same); *D.N. ex rel. Nelson v. Snyder*, 608 F.Supp.2d 615, 627 (M.D. Pa. 2009) (finding that concealment was an affirmative act in a state-created danger analysis); *see also Doe v. Allentown School District*, 2007 W.L. 2814587, at *6 (E.D. Pa. Sept. 21, 2007) (noting that concealment could constitute an affirmative act for purposes of the state-created danger theory). *See also* this Court's finding that mere words by a state actor can constitute an affirmative act. *Richardson v. Huber Heights City Sch. Bd. of Educ.*, 651 F. App'x. 362, 363 (6th Cir. 2016) (finding that a coach telling a high school athlete "take care of it," regarding a fight between teammates, constituted an affirmative act). Accordingly, taken in the light most favorable to the Plaintiffs, the First Responders' statements to the family dissuading medical aid coupled with Defendants' affirmative misrepresentation as to Tamisha medical condition constitute affirmative acts. *See generally Meyers v. Cincinnati Bd. of Educ.*, 343 F.Supp.3d 714, 723-24 (S.D. Ohio 2018), *aff'd*, 983 F.3d 873 (6th Cir. 2020).

When finding no affirmative act by the First Responders based on *Willis*, the district court erred. *Willis* is distinguishable with respect to the required “affirmative act.” In *Willis* the plaintiff could point only to the failure to recognize that the victim of an accident was still alive. *Willis*, 360 F. App’x. at 601-602. “Here, the conduct of Bishop and Counts falls neatly into the ‘failure to act’ category – they failed to discover that Christopher [victim] was still alive and thus did not provide him with the medical care he needed. . . Bishop and Counts did not make Christopher less safe by increasing the risk that he could have been exposed to private acts of violence.” *Id.* at 601. In contrast here, it is alleged in the TAC that the First Responders called Dr. Darr at Ascension Providence Southfield Hospital for permission to stop resuscitative measures (§32), advised Dr. Darr that Timesha did not have any rhythm change and was asystole through the entire resuscitation, “which was untrue” (§33), and that the First Responders willfully misrepresented the medical data to Dr. Darr, information upon which Dr. Darr relied when giving his consent to cease CPR efforts (§101). The necessary “plausibility” giving rise to an entitlement to relief includes the misrepresentation of the medical data to Dr. Darr (*Id.* at §§32, 33, 100-101).¹¹ Such misrepresentation also

¹¹ It was only after the First Responders in this case had misrepresented the medical data to Dr. Darr that they then obtained his consent to treat Timesha as deceased, and from there ultimately subjected her to the funeral home processes.

constitutes an affirmative act, in stark contrast to *Willis* in which the plaintiff pointed to the omission of the First Responders to recognize that the decedent was then alive.

4. Private act of violence.

Both the district court and the magistrate judge determined that Plaintiff had not alleged facts supporting a private act of violence sufficient to establish a state created danger claim. (R.E. 100, Opinion and Order, PageID# 2682-2684; R.E. 97, Order, PageID# 2558-2566). The magistrate judge found that alleging conduct that may have resulted in a three hour period of time in which Timesha did not receive additional medical care, and being placed in a body bag, are not “simply the same as saying the First Responders increased the risk Timesha would be exposed to ‘private act of violence.’” (R.E. 97, PageID# 2566). So, too, the district court found that, “to hold that these circumstances amount to private acts of violence would turn the general rule – that state actors have no constitutional duty to render competent medical services or rescue services – on its head.” (R.E. 100, Opinion and Order, PageID# 2684). Each relied primarily on *Willis* when rejecting the sufficiency of pleading a private act of violence, analogizing the situation here to *Willis* in which this Court stated that “[a]lthough it seems certain that his condition deteriorated during the two hours he was left untreated [the first respondents] did

not carry out any affirmative acts that increased the risk that [Willis] would be exposed to private acts of violence.” *Willis*, 360 F. App’x. at 601-602.

The analogy to *Willis* is not apt here. As reflected in ¶¶48-53, the First Responders created a situation in which Timesha, while still alive, was wrapped in a sheet and placed in a body bag, transported to a funeral home, and was in the process of having her body readied for funeral services when it was discovered by the funeral home personnel that she was indeed alive. *Willis* did not deal with these particular facts. Indeed, with respect to the private act of violence requirement, there is no indication in *Willis* of *any* private actors’ acts or omissions whatsoever. Instead, it was the state actors who not only assumed that the decedent had passed but placed the white sheet over the decedent and left the decedent alone in the pickup cab for over 2 hours. Here, in contrast, the private act of violence included submitting Timesha to the funeral home processes, including placing her in a body bag where she remained under the funeral director recognized signs of life. The district court did not address how being processed by a funeral home director proceeding through the funeral home processes was not “violent” under these circumstances.

At the 12(b)(6) stage of the proceedings, the factual allegations of the TAC are to be taken as true. Based on the allegations in ¶¶51-53, from 803 a.m. on the day in question to 12:14 p.m., Timesha was treated as deceased, when she was not.

Indeed, at 11:40 a.m., she was readied for embalming at which time the funeral director unzipped the body bag and determined Timesha was alive, with eyes wide open, her chest moving up and down, gasping for air. *Id.* at ¶¶52-53; R.E. 81-5, PageID# 2367).

Moreover, there can be no legitimate claim that Timesha was safer before than after the incident. Prior to the First Responders' decision that she had died, Timesha had gone 4 hours and 37 minutes without CPR/resuscitative efforts.¹²

The district court did not cite a case in which a court has rejected the premature preparation of a person for funeral processing as falling outside the parameters of a private act of violence. Paragraphs 48-53 are specifically

¹² ¶26 of the TAC reads that CPR was discontinued at 8:03 a.m. (¶29), that the First Responders then called Dr. Darr at 8:09 a.m., 5 minutes after their efforts had ceased, for permission to discontinue resuscitative efforts (¶32), that the First Responders did not attempt to verify circulation or respiration by use of a stethoscope (¶34), that at all times relevant the First Responders had enough information that the Plaintiff was suffering from an emergency medical condition requiring immediate medical attention (¶43). It is further alleged that Leslie Holmes was dispatched to the house to pick up "the body," ¶51, at 9:10 a.m., arrived at the home at 11:25 a.m., pulled into the funeral home at 11:42 a.m., that at 12:14 p.m. the James Cole Funeral Home called the Oakland County Medical Examiner's Office to advise that Timesha was indeed alive (¶¶51-53) (R.E. 81-5, PageID# 2363-2367).

incorporated in Count IV, alleging state created danger. See ¶98, R.E. 81-5, PageID# 2382.¹³

¹³ To the extent there is not a specific allegation that applies ¶¶48-53 to Count IV, that deficiency could have easily been cured as offered by Plaintiff at R.E. 98, Objections, PageID# 2597.

ARGUMENT II

THE DISTRICT COURT ERRED WHEN GRANTING IN PART DEFENDANTS’ MOTION TO DISMISS UNDER FED. R. CIV. P. 12(B)(6), INCLUDING BUT NOT LIMITED TO THE DISTRICT COURT’S DETERMINATION THAT PLAINTIFF’S THIRD AMENDED COMPLAINT WAS FUTILE.

A. Standard of review.

This Court reviews a district court’s grant of a motion to dismiss *de novo*. *Majestic Bldg. Maint. Inc. v. Huntington Bancshares, Inc.*, 864 F.2d 455, 458 (6th Cir. 2017). Under that standard, a motion to dismiss is properly granted if the plaintiff has “fail[ed] to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the plaintiff must allege facts that are sufficient “to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The reviewing court must accept the factual allegations in the complaint as true and construe the complaint in the light most favorable to the plaintiff. *Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710, 716 (6th Cir. 2006).

B. Argument.

If the Court determines Plaintiff’s TAC should have been allowed, this forms an independent basis to reverse the district court’s grant of the Motion to Dismiss

the §1983 claim. Plaintiff incorporates Argument I, applying the state-created danger doctrine. Even without the TAC, the district court erred by dismissing the §1983 claim premised on the SAC.

1. The First Responders.

Plaintiff alleged that the First Responders deprived Timesha of her Fourteenth Amendment due process rights when they erroneously declared her deceased, preventing her from receiving any further medical treatment she desperately needed. As alleged in both the SAC and proposed TAC, Defendants' actions were intentional, or deliberately indifferent to her constitutional rights. Second, Plaintiff alleged the First Responders were acting under the color of state law within the course and scope of their employment as paramedics/EMTs/firefighters for the City of Southfield's Fire Department. Accordingly, Plaintiff stated a constitutional §1983 claim against Defendants on behalf of Timesha's Estate.¹⁴

¹⁴ The district court never reached the question of whether the First Responders' conduct shocked the contemporary conscience. *Doe v. Jackson Local Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 933 (6th Cir. 2020). Had it done so, the most relevant factor here is that the First Responders had time to deliberate – they were not forced to make a quick decision – and that there are allegations that the First Responders intended to withhold relevant medical information from Dr. Darr. Given the time to deliberate standard, the intent-to-harm standard, which makes sense when there is no time to deliberate, would be inapplicable. *Cnty. Of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998). See ¶¶32-33, 101-102 of the TAC (R.E. 81-5, TAC, PageID# 2364, 2383).

In *Jackson*, this Court noted that “a constitutional claim may be premised on state action cutting off private sources of rescue without providing an adequate alternative,” citing *Beck v. Haik*, 377 F.3d 624 (6th Cir. 2004). The court noted that, for example, a valid constitutional claim might be made when police threatened to arrest private search and rescue drivers at the scene of a drowning, and then failed to provide adequate state divers, which was the issue in *Beck*. *Id.* at 629, 643. The *Jackson* court rejected *Beck* however, concluding that the plaintiff in *Jackson* had only alleged one relevant fact to that particular inquiry; “that the EMTs put decedent in an ambulance but did not discourage others from entering the ambulance. *Jackson*, at 591-592.

As already explained, the facts in this case are clearly distinguishable from *Jackson* and more similar to *Beck*, in which this Court concluded that there was a genuine issue of fact as to whether a state actor violated the plaintiff’s decedent’s constitutional rights by preventing volunteer divers from attempting a timely rescue. Here the First Responders’ decision to discontinue CPR and pronounce Timesha deceased prior to obtaining permission to discontinue such efforts increased the risk of harm to Timesha because: (1) it prevented her from receiving *any* further treatment given that she was thought to be deceased already; and (2) it allowed Timesha to be placed in a body bag alive, after an extended period of time during which was presumed deceased, and treated as such, without any medical

treatment. First, Defendants increased the harm to Timesha by **willfully** giving Dr. Darr faulty information, which he no doubt relied on when he acquiescence to ceasing CPR efforts. This deliberate, intentional conduct increased Timesha's risk of harm because it validated Defendants' erroneous premature pronouncement that Timesha was deceased, during which time she received no medical treatment. A critical fact in this case, missing from *Jackson*, is that the First Responders purposefully conveyed false information to Dr. Darr, and deliberately pronounced that Timesha was deceased when (viewing the factual allegations in a light most favorable to Plaintiff) they knew that she was not. This is not to be taken lightly given the significant weight a doctor's opinion carries. Once the First Responders had come and gone – the very authorities that Timesha's family relied on to provide care – there was nothing for the family to do but follow their directives and contact the funeral home.

The consequences for Defendants' conduct, and the impact it had on the help Timesha received, cannot be understated. When others present tried to intervene on Timesha's behalf for additional medical attention, they were consistently advised by Defendants that she was deceased. The family was told that Timesha's body was just reacting to the medication. Sadly, as a result of Defendants' willful misrepresentations to Dr. Darr and continued misconduct, Timesha was forced to just lie there as her condition worsened, eventually ***being placed in a body bag***

alive. The fact that Timesha was alive and in need of emergent medical care was not revealed until Steven Shaw of James H. Cole Funeral Home discovered that she was very much alive and gasping for air. Unfortunately, by this time, she was also suffering from a significant anoxic brain injury.

This Court has described the standard as “deliberate indifference,” explaining that there is no “calibrated yard stick” for evaluating whether state action meets this standard. *Doe v. Jackson Local Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 931 (6th Cir. 2020). “To aid navigation through these murky waters,” the *Doe* Court explained that the deliberate indifference standard contains two separate components (the first of which itself has two components) *Id.* at 933. First, an official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and they must also draw the inference. Secondly, having drawn that inference, the official must act or fail to act in a manner demonstrating “reckless or callous indifference toward the individual’s rights.” *Jackson*, 954 F.3d at 933. Deliberate indifference may be proven circumstantially by evidence showing the risk was so obvious that the official had to have known about it. *Bukowski v. City of Akron*, 326 F.3d 702 (6th Cir. 2003).

Here the facts in the Complaints are sufficiently pled in both the SAC and certainly in the proposed TAC to meet the deliberate indifference standard. Even *after* the First Responders declared Timesha deceased, the cardiac monitor

continued showing electrical activity indicating normal levels of exhaled CO₂ (R.E. 55, SAC, ¶34, PageID# 1682). Despite, seeing this activity, Defendants consistently maintained that she was deceased. First, they misrepresented the readings when they failed to convey this vital information to Dr. Darr. Then, compounding this conduct, Defendants told the family that Timesha's body was just reacting to the medication. Defendants continued to endorse that she was deceased, even *after* Timesha's family alerted Defendants on multiple occasions that she still had a pulse and was still breathing. Defendants' conduct in pronouncing Timesha dead despite the multiple signs to the contrary – i.e., the cardiac monitor showing normal levels of exhaled CO₂, her chest moving up and down, a pulse, etc. – meets the “deliberate indifference” standard.

2. The *Monell* claim against the City of Southfield based on an alleged viable constitutional claim.¹⁵

A plaintiff may bring a §1983 claim against a municipality or local government. *Monell v. Dep't of Soc. Servs.*, 436 U.S. at 694. To prevail in such a suit, the plaintiff must show that the alleged violation of his federal rights was caused by a municipal policy or custom. *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005).

¹⁵ Plaintiff contends the *Monell* claim is actionable under both the TAC – if allowed – and the SAC.

“[T]o satisfy the *Monell* requirements a plaintiff must identify the policy, connect the policy to the city itself, and show that the particular injury was incurred because of the execution of that policy.” *Wright v. City of Euclid, Ohio*, 962 F.3d 852, 880 (6th Cir. 2020), citing *Jackson*, 925 F.3d at 829 (internal quotation omitted).

“[A] city may be liable under *Monell* for a policy of permitting constitutional violations regardless of whether the policy is written.” *Jackson*, 925 F.3d at 830; see *Monell*, 436 U.S. at 691, 98 S.Ct. 2018 (“Congress included customs and usages [in §1983] Although not authorized by written law, such practices ... could well be so permanent and well settled as to constitute a ‘custom or usage’ with the force of law.” When proceeding under the official custom or policy theory of *Monell* liability, Plaintiff “must show that there were formal rules or understandings – often but not always committed to writing – that were intended to, and did, establish fixed plans of action to be followed under similar circumstances consistently and over time.” *Wright*, 962 F.3d at 880 (cleaned up).

Defendants had argued that there is no municipal liability owed by the City of Southfield for Plaintiff’s constitutional claims, because there was no underlying constitutional violation committed by Defendants Storms, Rickard, Mulligan, and Kroll. For the reasons previously already stated, the First Responders did in fact

violate Plaintiff's constitutional rights. As a result, dismissal of Plaintiff's municipal liability claim against Defendant City of Southfield should be reversed.

In *Thomas*, the Court identified four ways a plaintiff may prove the existence of an illegal policy or custom. 398 F.3d at 429. The plaintiff can point to (1) the government's legislative enactments or official policies; (2) actions by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom or practice of tolerating the violation of federal rights by its officers or agents. *Id.* Where no formal policy exists, the critical inquiry is whether there is a policy or custom that although not explicitly authorized "is so permanent and well settled as to constitute a custom or usage with the force of law." *Jones v. Muskegon Cty.*, 625 F.3d 935, 946 (6th Cir. 2010).

"When determining whether a municipality has adequately trained its employees, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform." *Jackson*, 925 F.3d at 834 (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)).

"There are at least two situations in which inadequate training could be found to be the result of deliberate indifference. First, and most commonly, a plaintiff can demonstrate deliberate indifference by showing that the municipality has failed to act in response to repeated complaints of constitutional violations by its officers." *Ouza v. City of Dearborn Heights, Michigan*, 969 F.3d 265, 287 (6th

Cir. 2020) (cleaned up). “Under this approach, a plaintiff must show that the defendant was aware of prior instances of unconstitutional conduct such that it was clearly on notice that the training in this particular area was deficient and likely to cause injury and yet ignored a history of abuse.” *Id.* This is the most common way of proving deliberate indifference.

Plaintiff sufficiently alleged an unconstitutional custom and policy of failing to train and supervise under this approach.

- At all times relevant, Defendant City of Southfield knew that its *policies, procedures, customs, propensity and patterns of allowing paramedics and/or EMT’s to avoid taking someone with a serious medical condition to the hospital would deprive citizens of treatment, such as Plaintiff’s decedent Timesha Beauchamp.* *Id.* at ¶86.
- At all times relevant, Defendant City of Southfield knew that its *policies, procedures, customs, propensity and patterns allowed paramedics and/or EMT’s to stop resuscitative efforts before getting permission from proper authorities.* *Id.* at ¶87

(R.E. 55, SAC, ¶¶86-87, PageID# 1694).

In addition to showing “other instances” of misconduct, a second way in which a plaintiff can show a genuine factual dispute regarding deliberate indifference is “In a narrow range of circumstances, a plaintiff can show that a municipality was deliberately indifferent by failing to equip law enforcement officers with specific tools to handle recurring situations.” *Ouza*, 969 F.3d at 287 (cleaned up), citing *Brown*, 520 U.S. at 409. As the Supreme Court explained in

City of Canton, “it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.” 489 U.S. at 390.

In *Ouza*, the Court explained that, for instance, “if a municipality failed to provide any training to its officers on the use of deadly force, it would be liable to a person unconstitutionally killed by the police, given that city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons and the city has armed its officers with firearms, in part to allow them to accomplish this task.” *Ouza*, 969 F.3d at 287. The Court held that, in that type of situation, “the need to train officers in the constitutional limitations on the use of deadly force can be said to be so obvious, that failure to do so could properly be characterized as deliberate indifference to constitutional rights.” *Id.* (cleaned up). “Under this approach of demonstrating deliberate indifference, a plaintiff does not need to show that the municipality had notice of a pattern of unconstitutional conduct. Instead, a plaintiff can show deliberate indifference based on “single-incident liability” if the risk of the constitutional violation is so obvious or foreseeable that it amounts to deliberate indifference for the city to fail to prepare officers for it.” *Id.* (cleaned up).

This case presents the *exact* type of situation discussed in *Ouza*, where the need to train officers in the constitutional limitations of misrepresenting medical data and foreclosing a citizen from receiving any medical care, by virtue of pronouncing them dead, is so obvious, that failure to do so is properly characterized as deliberate indifference to constitutional rights. This case involved officers responding to a medical emergency. As medical EMS professionals, Defendants knew that they would be called on to provide triage care and to take necessary vitals. Even more significantly, it is obvious that conveying accurate medical data to the doctor who makes the call of death is critically important. This is a scenario that the officers would face repeatedly in their interaction with the public. The need for proper training is obvious. The City *knows* that its officers will be required to provide emergency services, and that they are the gateway between someone, like Timesha, being taken to the hospital or the morgue. The need to train officers in the constitutional limitations on providing care in these instances is obvious. And lack of proper training leads to the exact results seen here, where inaccurate data given to the doctor resulted in Timesha being declared dead, and the Defendants' conduct foreclosed all avenues of receiving proper medical attention.

Under *Ouza*, Plaintiff does not *need* to allege "other instances" of unconstitutional conduct to establish a custom and policy of failing to train and

supervise against the City. Instead, Plaintiff “can show deliberate indifference based on single-incident liability” because “the constitutional violation is so obvious or foreseeable that it amounts to deliberate indifference for the city to fail to prepare officers for it.” *Id.* Plaintiff has sufficiently pleaded an unconstitutional custom and policy of failing to train and supervise officers.

ARGUMENT III

THE DISTRICT COURT ERRED IN DISMISSING THE CASE BASED ON QUALIFIED IMMUNITY.

A. Standard of review.

Whether qualified immunity applies to an official's actions is a question of law that this Court reviews *de novo*. *Virgilia v. Gilbert*, 272 F.3d 391, 392 (6th Cir. 2001).

B. Argument.

Under the doctrine of qualified immunity, “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Created to protect government officials from interference with their official duties, qualified immunity “is an immunity from suit rather than a mere defense to liability.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). To determine whether government officials are entitled to qualified immunity, we ask two questions: “First, taken in the light most favorable to the party asserting the injury, do the facts alleged show that the officer’s conduct violated a constitutional right? Second, is the right clearly established?” *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

In its Opinion and Order, the district court reasoned that qualified immunity would be extended to the Defendants because “Plaintiff does not state a claim under the state created danger exception.” (R.E. 100, Opinion and Order, PageID# 2689).¹⁶ The district court also ruled that, even if Plaintiff had stated a claim for constitutional rights, Timesha’s constitutional rights “were not clearly established.” *Id.* at p. 15, PageID# 2689.

With respect to the first ruling, the Court is respectfully referred to Arguments I and II, incorporated here, by which Plaintiff has demonstrated that she stated a claim under the state created danger exception. With respect to the second point, the state-created danger exception was clearly established as a legal doctrine years before the Defendants’ alleged August 2020 constitutional violations in this case. As previously explained, the Sixth Circuit endorses the two exceptions set forth in *DeShaney* to the notion that state actors only owe a duty to provide adequate medical care to those in its custody. *DeShaney* was decided in 1989. Since that time and certainly at the times in question here in 2020, as indicated by the discussion and citations next, the right to be protected from state-created danger has become clearly established in this Circuit.

¹⁶ The magistrate judge did not address the issue of qualified immunity, the order denying Plaintiff’s motion for leave to amend limited to the propriety of the amendment.

In *Kallstrom*, this Court recognized a right against government acts that threaten an individual’s “security and bodily integrity,” and held that state actors can be liable under §1983 for “increasing the likelihood that a private actor would deprive [the plaintiffs] of their liberty interest in personal security.” 136 F.3d at 1062-64, 1067; see also *Id.* at 1062-63. (“Individuals have a ‘clearly established right under the substantive component of the Due Process Clause to personal security and to bodily integrity” (quoting *Doe v. Claiborne County*, 103 F.3d 495, 507 (1996)); *Id.* at 1066 (“Liability under the state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence.”) Numerous other cases have reiterated this doctrine. See e.g., *McQueen v Beecher Elementary Schl.*, 433 F.3d 460, 463-64 (6th Cir. 2006); *Cartwright*, 336 F.3d at 493; cf., e.g., *Paine v. Cason*, 678 F.3d 500, 510 (7th Cir. 2012) (“It is clearly established that state actors who, without justification, increase a person’s risk of harm violate the Constitution.”) And in *Nelson v City of Madison Hts.*, 845 F.3d 695 (6th Cir. 2017), this Court directly addressed qualified immunity with respect to state-created danger, rejecting the officer’s claim to qualified immunity because *Kallstrom* clearly established that the state may not affirmatively act in a way that creates or increases a risk of private violence, provided that the state actor had the requisite mental culpability. *Id.* at 700-703. (“[T]he district court properly denied Officer

Wolowiec’s summary judgment motion because a reasonable jury could find that, under the state created danger theory of liability, he engaged in affirmative acts that increased Hilliard’s risk of exposure to private acts of violence, which deprived Hilliard of her clearly established Due Process rights to personal security and bodily integrity.”)

While the right at issue within the qualified immunity inquiry should be defined with an appropriate level of specificity, because the right at issue here is the right against a state official acting to increase an individual’s risk of private violence with the knowledge of or at least deliberate indifference to that increased risk, the right is “sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (per curiam) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

The district court defined too narrowly whether the state created danger exception was “clearly established.” It reasoned that there was “no case law that stands for the proposition that ‘the premature preparation of a person for funeral processing’ constitutes a private act of violence for purposes of the state created danger doctrine.” (R.E. 100, Opinion and Order, p. 15, n. 7, PageID# 2689). *Jane Doe v. Jackson Loc. Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 932 (6th Cir. 2020); *Engler v. Arnold*, 862 F.3d 571, 575-576 (6th Cir. 2017); *Cartwright v. City of*

Marine City, 336 F.3d 487, 493 (6th Cir. 2003); *Kallstrom*, 136 F.3d at 1066-67. A rule is clearly established either when it is “dictated by ‘controlling authority’ or ‘a robust consensus of cases of persuasive authority.’” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011); *Dist. of Columbia v. Wesby*, 138 S.Ct. 577, 589-590 (2018). “[T]he salient question is whether the state of the law at the time of the defendants’ conduct gave them fair warning that their alleged treatment of the plaintiffs was unconstitutional.” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

The Supreme Court has rejected the position that the determination of whether or not a constitutional right is “clearly established” requires a finding that the facts before the court are granularly similar to a previous case. The Court has instead explained that “general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.” *Hope*, 536 U.S. at 741. Nor are cases involving materially similar facts are not necessary to a finding that the law was clearly established. *Hope*, 536 U.S. at 741. “[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.” *Hope*, 536 U.S. at 741, 122 S.Ct. 2508; *see also Taylor v. Riojas*, 141 S.Ct. 52, 54 (2020) (holding that qualified immunity should not be granted when “any reasonable

officer should have realized that [the conduct at issue] offended the Constitution”); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-78 (2009); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). Thus, officers can be on notice that their conduct violates established law even in novel factual circumstances.

Additionally, pre-incident here, many circuits had adopted the state-created danger theory.¹⁷ “The widespread acceptance of the state-created danger theory . . . was sufficient to clearly establish that a state official may incur a duty to protect a plaintiff where the official creates or exacerbates a danger to the plaintiff.” *Irish v.*

¹⁷ The Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. circuits have adopted the doctrine; *see also e.g.*, *Okin v. Vill. Of Cornwall-on-the-Hudson Police Dep’t*, 577 F.3d 415, 427-428 (2d Cir. 2009); *Sanford v. Stiles*, 456 F.3d 298, 304-305 (3d Cir. 2006); *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015); *Jane Doe v. Jackson Loc. Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 932 (6th Cir. 2020); *D.S. v. E. Porter Cnty. Sch. Corp.*, 799 F.3d 793, 798 (7th Cir. 2015); *Fields v. Abbott*, 652 F.3d 886, 890-891 (8th Cir. 2011); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1066 (9th Cir. 2006); *Est. of B.I.C. v. Gillen*, 710 F.3d 1168, 1173 (10th Cir. 2013); *Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C. Cir. 2001). The Fifth and Eleventh Circuits have not recognized the state-created danger doctrine. *Cook v. Hopkins*, No. 19-10217, 2019 U.S. App. LEXIS 33713, at *13 (5th Cir. Nov. 8, 2019); *Vaughn v. City of Athens*, No. 05-12953, 2006 WL 1029167, at *1, n. 1 (11th Cir. Apr. 20, 2006).

Fowler, 979 F.3d 65, 77 (1st Cir. 2020) (applying the “clearly established” standard with respect to a July 15, 2015 incident).¹⁸

With respect to the second element of the “clearly established” inquiry, focus on the facts of this particular case and whether a reasonable first responder would have understood that his conduct violated the Plaintiff’s constitutional rights is well-established through ¶¶35, 38-42 of both the SAC and the TAC. When combined with the allegations that the Defendants discontinued CPR and pronounced Timesha deceased prior to obtaining permission to discontinue such efforts, (¶100) and the allegation that the First Responders willfully misrepresented the medical data to Dr. Darr – information he relied on when giving his consent to cease CPR efforts (¶101). The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to establish the violation. *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015).

Moreover, a case need not “be on all fours in order to form the basis for the clearly established right.” See *Burgess v. Fischer*, 735 F. 3d 462, 474 (6th Cir. 2003). Courts have “made clear that officials can still be on notice that their

¹⁸ The Court should also note that since *DeShaney* the Supreme Court has never even granted a petition for a writ of certiorari in any case involving a circuit court’s adoption, recognition, or application of the “state-created danger” theory.

conduct violates established law even in novel factual circumstances. *Hope v. Pelzer*, 536 US 730, 741 (2002). In short, “the *sine qua non* of the ‘clearly established’ inquiry is ‘fair warning,’ ” *Baynes v. Cleland*, 799 F.3d 600, 612-13 (6th Cir. 2015) (quoting *Hope*, 536 U.S. at 741), and we ask only “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted,” *Id.* at 610 (quoting *Saucier*, 533 U.S. at 202).

Here, there is sufficient evidence that a reasonable officer in Defendants’ capacity as medical professionals would know that, under the circumstances of which Defendants were aware, choosing to pronounce Timesha deceased, despite the multiple signs to the contrary, would be unlawful. Defendants willfully misrepresented medical data about Timesha to Dr. Darr, creating a situation where Timesha was wrongfully declared deceased and all medical aid to her was stopped. Their conduct also prevented the family from aiding, or getting aid, for Timesha. The family called the authority, the Defendants, and instead of transporting Timesha to a hospital or rendering further aid, they declared her dead.

Any reasonable officer would know that the First Responders’ conduct was unlawful and a state-created danger, *i.e.*, create a serious risk of harm because it prevented her from receiving the “timely” treatment she needed given that she was thought to already be deceased. To reiterate, Defendants exponentiated the risk of harm to Timesha, and cut off all other possible avenues to get her help.

Accordingly, Defendants are not entitled to qualified immunity and dismissal of Plaintiff's Fourteenth Amendment claim should have been denied.

CONCLUSION

Plaintiff-Appellant requests this Court reverse and vacate the district court's decision and issue any other relief this Court deems appropriate under the circumstances.

Respectfully submitted,

Fieger, Fieger, Kenney & Harrington, P.C.

/S/ Robert G. Kamenec
Geoffrey N. Fieger (P30441)
Robert G. Kamenec (P35283)
James J. Harrington, IV (P65351)
Attorneys for Plaintiff-Appellant
19390 W 10 Mile Road
Southfield, MI 48075
(248) 355-5555
g.fieger@fiegerlaw.com
r.kamenec@fiegerlaw.com
j.harrington@fiegerlaw.com

Dated: November 17, 2022

CERTIFICATE OF COMPLIANCE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

ROBERT G. KAMENEC, being first duly sworn, certifies and states the following:

1. He is an attorney with the firm Fieger, Fieger, Kenney & Harrington, P.C., and is in principal charge of the above-captioned cause for the purpose of preparing the attached Brief on Appeal;
2. The brief on appeal prepared by his office complies with the type-volume limitation;
3. The firm relies on the word count of their word processing system used to prepare the brief, using Times New Roman size 14 font; and
4. The word processing system counts the number of words in the brief as 12,986.

/s/ Robert G. Kamenec
ROBERT G. KAMENEC

Case No. 22-1681

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

HOWARD T. LINDEN, as Personal Representative
of the Estate of Timesha Beauchamp,

Plaintiff-Appellant,

v.

CITY OF SOUTHFIELD, MI; MICHAEL STORMS;
SCOTT RICKARD; PHILLIP MULLIGAN;
JAKE KROLL,

Defendants-Appellees.

Appeal from the United States District Court
Eastern District of Michigan
Case No. 2:20-cv-12738

CERTIFICATE OF SERVICE

Robert G. Kamenec, attorney with the law firm of Fieger, Fieger, Kenney & Harrington, P.C., hereby certifies that on November 17, 2022, he caused a copy of this document to be served upon all parties of record, and that such service was made electronically upon each counsel of record so registered with the United States Court of Appeals for the Sixth Circuit and via U.S. Mail to any counsel, or *In Pro Per* parties not registered to receive electronic copies from the court, by enclosing same in a sealed envelope with first class postage fully prepaid,

addressed to the above, and depositing said envelope and its contents in a receptacle for the U.S. Mail.

Respectfully submitted,

Fieger, Fieger, Kenney & Harrington, P.C.

/S/ Robert G. Kamenec
Geoffrey N. Fieger (P30441)
Robert G. Kamenec (P35283)
James J. Harrington, IV (P65351)
Attorneys for Plaintiff-Appellant
19390 W 10 Mile Road
Southfield, MI 48075
(248) 355-5555
g.fieger@fiegerlaw.com
r.kamenec@fiegerlaw.com
j.harrington@fiegerlaw.com

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

<u>Record Entry #</u>	<u>Description</u>	<u>PageID#</u>
1	Complaint	1-22
2	[First] Amended Complaint	23-49
13	Plaintiff's Motion for Leave to File Second Amended Complaint	95-215
50	Defendant's Motion Judgment on the Pleadings	1537-1599
54	Order Granting Motion for Leave to File Second Amended Complaint	1674-1675
55	Second Amended Complaint	1676-1702
64	Defendants' Motion to Dismiss Under Rule 12(b)(6)	1988-2061
76	Plaintiff's Response to the Motion to Dismiss	2206-2233
79	Defendants' Reply	2247-2252
81	Plaintiff's Motion for Leave to File Third Amended Complaint	2257-2390
81-5	Proposed Third Amended Complaint	2358-2387
86	Defendants' Response to Plaintiff's Motion for Leave to File Third Amended Complaint	2424-2442
88	Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Leave to File Third Amended Complaint	2445-2453
91	Plaintiff's Supplemental Brief Regarding Applicability of New Authority on the State-Created Danger Exception	2475-2521
92	Defendants' Supplemental Brief Regarding Applicability of New Authority on the State-Created Danger Exception	2522-2535
Between 96 & 97	Virtual video proceedings of 11/17/2021 on Plaintiff's Motion for Leave to File Third Amended Complaint	N/A
97	Order Denying Plaintiff's Motion for Leave to Amend	2544-2574
98	Plaintiff's Objection to Order Denying Plaintiff's Motion for Leave to Amend	2575-2660
99	Defendants' Response to Objections	2661-2674

<u>Record Entry #</u>	<u>Description</u>	<u>PageID#</u>
100	Opinion and Order Overruling Plaintiff's Objection, Granting in Part Defendant's Motion to Dismiss, and Declining to Exercise Supplemental Jurisdiction Over Plaintiff's State Law Claim	2675-2691
101	Judgment	2692
102	Notice of Appeal	2693-2713
106	Transcript [revised] of 11/17/2021 motion hearing	2751-2775