United States Court of Appeals
For the Eighth Circuit

No. 18-1941

William Anderson, as trustee for the next-of-kin of Jacob William Anderson (deceased),

Plaintiff - Appellant

v.

City of Minneapolis; County of Hennepin; Hennepin Healthcare System, Inc.; Dr. Brian Mahoney, M.D., as then-Medical Director of the HCMC Ambulance Service; Shana D. York; Anthony J. Buda; Raul A. Ramos, and John Doe individuals to be determined, Individual Fire Department Personnel in Their Individual Capacities; Daniel F. Shively, and John Doe individuals to be determined, Individual HCMC Ambulance Services Personnel in Their Individual Capacities; Mitchel Morey, M.D., Individual Medical Examiner's Office Personnel, in his Individual Capacity; Daniel J. Tyra; Shannon L. Miller; Dustin L. Anderson; Scott T. Sutherland; D. Blaurat; Emily Dunphy; Christopher Karakostas; Matthew George; Joseph McGinness; Calvin Pham; Arlene M. Johnson; Matthew T. Ryan, and John Doe individuals to be determined, Individual Police Officers in Their Individual Capacities,

Defendants - Appellees

Appeal from United States District Court
for the District of Minnesota - Minneapolis

Submitted: March 12, 2019
Filed: August 20, 2019

Before SHEPHERD, ARNOLD, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

As the district court noted, this is a tragic case. Jacob Anderson (Jacob) died of hypothermia in Minneapolis, Minnesota on December 15, 2013. His father, William Anderson (Anderson), brought this suit alleging federal constitutional and state tort claims against the City of Minneapolis, Hennepin County, and several city and county employees.[1] The district court[2] granted defendants' motions to dismiss with prejudice. Anderson appeals the dismissal of his constitutional claims, and we affirm.

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[1] Because there are many individual defendants in this case, for clarity and concision we refer to them, where appropriate, in groups by their professional affiliations: firefighters, paramedics, and police.

[2] The Honorable Susan Richard Nelson, United States District Judge for the District of Minnesota.

App. 3

I.

A.

In the fall of 2013, Jacob was a 19-year old freshman at the University of Minnesota, Twin Cities. He was an active member of the university community. On the night of December 14, 2013, he attended a party with several other students. He left around 11:15 p.m.

Jacob was discovered the next morning, lying face down in the snow in a remote area of Minneapolis near the Mississippi River. The passerby who found him called 911 at 8:44 a.m. The first responders, employees of the Minneapolis Fire Department, arrived on the scene ten minutes later. The fire department defendants, some of whom were certified emergency medical technicians, performed a 30-second check on Jacob's pulse by holding his wrist, which was frostbitten and cold to the touch. Failing to find a heartbeat, the fire department defendants pronounced him dead at 8:57 a.m.

Having declared Jacob dead, the fire department defendants cancelled the ambulance and called police to the scene. However, the paramedics had already arrived. The paramedic defendants spoke with the fire department defendants but did not separately evaluate Jacob's condition and left after about two minutes. Several police officers arrived next. Shortly after the first police defendants arrived, the fire department defendants left. The police treated the area as a potential crime scene and notified the Hennepin County Medical Examiner's Office at 10:30 a.m.

The medical examiner's office sent two investigators to the scene. After conducting an examination of Jacob's body, which was still where it had been found almost two hours earlier, the investigators called defendant Assistant Medical Examiner Mitchel Morey, M.D. Based on the investigators' report, Morey did not visit the scene. Eventually, the medical examiner's office conducted an autopsy and determined that Jacob died of hypothermia. The autopsy listed the time of death as 8:48 a.m. Anderson alleges that Jacob may have in fact died several hours later, after emergency responders had declared him dead.

B.

Hypothermia is a medical condition that occurs when a body falls below 95 degrees Fahrenheit and cannot produce enough heat to replace what it loses.[3] App. 86. Frostbite is a medical condition that occurs when the skin and underlying tissues freeze. App. 87. Hypothermia and frostbite act together in ways that often disguise signs of life and make it particularly difficult for first responders to determine whether an individual is actually dead or just in a severely hypothermic condition. *Id.*

Despite appearances, individuals can make remarkable recoveries from even severe hypothermia.

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[3] The facts in this section, regarding the pathophysiology of hypothermia and frostbite, are drawn, as they must be at the motion to dismiss stage, from Anderson's complaint. *See Owen v. Gen. Motors Corp.*, 533 F.3d 913, 918 (8th Cir. 2008).

App. 88. As a result, first responders are trained to provide treatment even to apparently deceased hypothermia victims. For example, Minneapolis Fire Department standard operating procedures prescribe that first responders "[b]egin CPR immediately when [a] patient is found cold in a cold environment." App. 93. The Hennepin EMS protocol specifically notes that "clinical signs of death may be misleading" and instructs medical personnel to transport any bodies with a temperature below 86 degrees Fahrenheit in a cold environment to facilities prepared "for active internal rewarming." App. 104. Anderson alleges that Jacob passed away because these guidelines were not followed in this case.

C.

On December 8, 2016, Anderson and his wife, Kristi Anderson, filed a complaint in the district court against individual responders and the entities that responded to the 911 call. The complaint listed Anderson as the personal representative of Jacob's estate.

On March 9, 2017, more than three years after Jacob's death, Anderson was appointed as trustee for Jacob. On April 19, 2017, Anderson filed the operative Second Amended Complaint, alleging four causes of action under federal law and two causes of action under state law. The district court dismissed both state law causes of action, finding that, under Minnesota law, the claims were required to be brought by an appointed

trustee within three years of Jacob's death. Anderson does not appeal that decision.

The district court also dismissed the federal claims, all of which were brought under 42 U.S.C. § 1983 alleging violations of Jacob's substantive due process rights by first responders and their employing municipalities. Although it held that a different statute of limitations governed those claims and they were therefore properly before the court, the district court concluded that qualified immunity barred the claims against the individual defendants. Anderson could not show that the individual defendants had violated Jacob's substantive due process rights because he could not show that the state actors had created or exacerbated the danger to Jacob, placed Jacob "in custody," or alleged conduct sufficiently "conscience-shocking" to give rise to a claim under the Fourteenth Amendment. Because the district court found no individual liability, it dismissed the claims against the city and county defendants too.

Anderson timely appeals the federal claims advancing the single argument that the district court erred in finding qualified immunity, because the individual defendants created or exacerbated the danger to Jacob.

II.

Before reaching the merits of the dispute, "[w]e begin with jurisdiction, which is always our first and fundamental question." *Franklin v. Peterson*, 878 F.3d

631, 635 (8th Cir. 2017) (citation omitted). We review the district court's determination that it had subject matter jurisdiction *de novo*. *Am. Family Mut. Ins. Co. v. Vein Ctrs. for Excellence, Inc.*, 912 F.3d 1076, 1080 (8th Cir. 2019). The defendants claim that we lack jurisdiction because this action was not brought by an appointed trustee within three years of Jacob's death as Minnesota state survival law requires. *See* Minn. Stat. § 573.02, subd. 1. The district court thoroughly addressed this argument and correctly concluded that it (and we) have jurisdiction.

As the district court explained, we look to Minnesota's survivorship statute only to determine *who* can bring a § 1983 action on behalf of a deceased individual. *Estate of Guled v. City of Minneapolis*, 869 F.3d 680, 683 (8th Cir. 2017). We do not incorporate other rules—like the limitations period—that are found in that statute. Rather, as we have held several times, the limitations period for all § 1983 actions in Minnesota comes from the state's personal injury statute and is set at six years. *See*, *e.g.*, *Egerdahl v. Hibbing Cmty. Coll.*, 72 F.3d 615, 618 n.3 (8th Cir. 1995); Minn. Stat. § 541.05, subd. 1(5). We have jurisdiction because Anderson brought this suit within six years of Jacob's death.

III.

We review the district court's grant of a motion to dismiss based on qualified immunity *de novo*, taking

the facts as alleged by the plaintiff. *Groenewald v. Kelley*, 888 F.3d 365, 370 (8th Cir. 2018).

A.

Anderson's claims against the various individual defendants in this case depend upon slightly different factual allegations, but they are essentially one claim: the defendants, by prematurely declaring Jacob dead and therefore cutting off possible aid, caused his death in violation of the due process clause of the Fourteenth Amendment. Because Jacob has failed to identify a clearly established right, we hold the individual defendants are entitled to qualified immunity.

As a general rule, state actors are not liable for failing to save individuals in life-threatening situations. The due process clause is not "a guarantee of certain minimal levels of safety and security" and it does not "impose an affirmative obligation on the State to ensure that [its citizens'] interests do not come to harm through other means." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). However, "the state owes a duty to protect individuals if it created the danger to which the individuals are subjected." *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005) (citation omitted). State officials "create[ ] the danger" faced by an individual when they "act affirmatively to place [him] in a position of danger that he . . . would not otherwise have faced." *S. S. v. McMullen*, 225 F.3d 960, 962 (8th Cir. 2000) (en banc). Anderson argues that happened here.

We need not reach the merits of this argument if the individual defendants are entitled to qualified immunity. "The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Walker v. City of Pine Bluff*, 414 F.3d 989, 992 (8th Cir. 2005) (citation omitted). To overcome a qualified immunity defense, a plaintiff must show both that a statutory or constitutional right has been violated and that the right was clearly established at the time of the alleged violation. *Smith v. City of Minneapolis*, 754 F.3d 541, 546 (8th Cir. 2014). We "have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citation omitted). Because Anderson has failed to show the violation of a clearly established right, we resolve this case on that ground.

"A clearly established right is one that 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)). "A plaintiff need not always identify a case directly on point, but controlling authority or a robust consensus of cases of persuasive authority must put the statutory or constitutional question beyond debate." *Swearingen v. Judd*, 930 F.3d 983, ___, 2019 WL 3227454, at *2 (8th Cir. July 18, 2019) (citation omitted). As the Supreme Court has repeatedly stressed, we are "not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742.

Here we must ask whether, in December 2013, it was clearly established that the Fourteenth Amendment is violated when:

- fire department employees check the vitals on a hypothermia victim and declare him dead despite the fact that he is cold in a cold environment;[4]
- paramedics and the medical examiner do not conduct their own assessment of a hypothermia victim after earlier responders declare the victim dead;
- police officers do not conduct their own medical assessment of a hypothermia victim and treat the scene as a crime scene after earlier responders declare the victim dead.

We have never identified the right that Anderson asserts was violated. Anderson claims that *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990) and *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990) show that the right he identifies is clearly established, but neither case defines a specific right that is applicable here.

Shortly after *DeShaney* recognized "state created danger" liability, we held that a state actor may be liable when he "has taken affirmative action which increases the individual's . . . vulnerability . . . beyond

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[4] Because these claims are similar, and because the claim against the fire department defendants presents the closest call, we will analyze the qualified immunity issue primarily through that lens. The analysis is the same for each group of individual defendants.

the level it would have been absent state action." *Freeman*, 911 F.2d at 55. Freeman, as representative of Geraldine and Valerie Downen's estates, brought suit against the police chief of Dumas, Arkansas for failing to protect the decedents from their husband and father who murdered them. *Id.* at 53. Freeman alleged the chief of police had interfered with his subordinates' earlier attempts to protect the victims from the murderer. *Id.* at 54. We explained that "[i]t is not clear, under *DeShaney*, how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect. It is clear, though, that at some point such actions do create such a duty." *Id.* at 55. We noted that we could find liability under *DeShaney* where "the state has taken affirmative action which increases the individual's . . . vulnerability . . . beyond the level it would have been at absent state action." *Id.* We thus remanded the case and permitted Freeman to replead in light of *DeShaney*. *Id.*

Anderson argues that *Freeman* recognized his claim that the fire department defendants' premature declaration of death made Jacob more vulnerable to hypothermia because it foreclosed any further assistance from the paramedics or police while he was alive. But *Freeman* only left open the possibility that we could recognize such a claim—it did not clearly establish a rule that such a claim is valid.[5] We explained

[5] At most, *Freeman* outlines the state's duty to protect at the level of "a broad general proposition," but does not establish any rule relevant to "the specific context of [this] case." *Mullenix*, 136

that "the law is not entirely established as to the extent to which the government must increase the danger of private violence before it assumes a corresponding duty to protect." *Id.* at 55. In the decades since then, no case has settled the state's duty in these circumstances.

Ross offers more specific guidance regarding the application of the *DeShaney* state-created danger exception, but it also differs significantly from this case. In *Ross*, a defendant police officer threatened to arrest two lifeguards, two firefighters, one police officer, and two civilian scuba divers if they attempted to rescue a boy who had recently fallen into Lake Michigan. 910 F.2d at 1424–25. Approved rescuers arrived twenty minutes later, by which time the boy had drowned. *Id.* The Seventh Circuit found a constitutional violation because the county, rather than merely failing to provide rescue services, "had a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative." *Id.* at 1431. Importantly for Anderson, the court stripped the officer of qualified immunity because it was clearly established that a victim had a constitutional right to not have the state exert its power to prevent his rescue when not undertaking its own rescue operation. *Id.* at 1432. The court founded this right in the "fundamental tenet of our constitutional jurisprudence" that "the state cannot arbitrarily

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S. Ct. at 308. As such, it does not clearly establish a right that defeats the individual defendants' qualified immunity defenses.

assert its power so as to cut short a person's life." *Id.* at 1433.

Unlike in *Ross*, no one intentionally or arbitrarily cut off emergency services to Jacob. Once the fire department defendants declared him dead the emergency response did not end but it changed. The defendants in this case may have performed their duties poorly, but if so, they made an error in judgment of the sort that qualified immunity protects. *See Walker*, 414 F.3d at 992. They did not intentionally deny emergency aid to someone they believed to be alive. The situation presented by this case is unique and the constitutional rule recognized in *Ross* does not apply to these facts.

In more factually similar cases, courts have found a constitutional violation only where the government has taken a more active role in placing the victim in harm's way. *See*, *e.g.*, *Riordan v. City of Joliet*, 3 F. Supp. 2d 889, 898–99 (N.D. Ill. 1998) (denying qualified immunity to police officers who dropped off an extremely intoxicated man on the side of the road at night in freezing weather). But even then, our cases demonstrate that a plaintiff faces a high bar. *See Gladden v. Richbourg*, 759 F.3d 960, 966–67 (8th Cir. 2014) (granting qualified immunity to officers who left plaintiff out in the cold because the plaintiff was not so extremely intoxicated that it was obvious to officers that he could not walk or make decisions for himself). The defendants in this case did not place Jacob out in the cold. Despite the tragic consequences that Anderson argues followed from their alleged failures, the

defendants did not violate a clearly established due process right.

Lacking an analogous case, Anderson argues that under *Hope v. Pelzer*, 536 U.S. 730 (2002), regulations can place state actors on notice that their actions violate an individual's constitutional rights. But *Hope* does not stand for that proposition. In *Hope*, prison guards handcuffed an inmate to a hitching post and left him there for seven hours as a punishment. *Id.* at 734–35. The Supreme Court denied qualified immunity *in part* because the guards had failed to follow a regulation that required officers to log an inmate's responses to offers of water and bathroom breaks every fifteen minutes when the inmate was shackled to fence posts. *Id.* at 744. The regulation had frequently been ignored in the past, which the Court considered evidence that the guards "were fully aware of the wrongful character of their conduct." *Id.* at 744. But the regulation was ultimately less important to *Hope*'s conclusion that the prison guards had violated the Constitution than: (1) a binding circuit case that recognized "handcuffing inmates to the fence and to cells for long periods of time" was unconstitutional, and (2) a notice from the Department of Justice warning the state prison system that its use of the hitching post fell below the requirements of both the Constitution and its own regulations. *Id.* at 742–45 (quoting *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974)). These were the facts—not the existence of the prison regulation—that the Court held should have "put a reasonable officer on notice that the use of the hitching post under

the circumstances alleged by Hope was unlawful." *Id.* at 745–46.

Anderson's argument that the regulations directing first responders to begin CPR and rewarming even where a hypothermia victim appears dead should be treated as evidence of a clearly established constitutional duty therefore fails because *Hope* itself was based on much more than the existence of a regulation. But even if Anderson were correct about what *Hope* means, we do not think that *Hope*'s rationale necessarily applies outside of the prison context. While it seems likely that the contours of a regulation regarding punishing prisoners will be informed at least in part by the Eighth Amendment, there is no reason to think that medical guidelines for first responders enshrine duties arising out of the Fourteenth Amendment. That the medical guidelines were not followed here could possibly be the basis for a negligence suit, but it is not the basis for a constitutional one.

We also reject Anderson's argument that qualified immunity is inapplicable because the first responders were not executing discretionary functions. We have previously suggested that the exception to qualified immunity for non-discretionary or ministerial acts is a "dead letter." *Sellers v. Baer*, 28 F.3d 895, 902 (8th Cir. 1994), *cert. denied*, 513 U.S. 1084 (1995); *see also*, *DeArmon v. Burgess*, 388 F.3d 609, 613 (8th Cir. 2004). Regardless of the state of the exception, it does not apply here. We explained in a similar case:

> The exception to qualified immunity for functions that are "ministerial" rather than "discretionary" is quite narrow. For qualified immunity purposes, a duty is "ministerial" only where the statute or regulation leaves no room for discretion—that is, it specif[ies] the precise action that the official must take in each instance. In addition, the ministerial-duty exception applies only where it is the violation of the ministerial duty that gives rise to the cause of action for damages.

Sellers, 28 F.3d at 902 (citations omitted). As in *Sellers*, Anderson cannot claim that he is entitled to damages simply because the regulations at issue were violated. "[T]he issue before us is whether the [defendants'] conduct violated any clearly established constitutional rights, not whether the [defendants] may have violated departmental regulations." *Id.* Anderson makes his claims based on the Fourteenth Amendment, not the Minneapolis Fire Department's regulations, and therefore the defendants are eligible for qualified immunity.

Finally, Anderson makes several other arguments directed at the district court's conclusion that no constitutional violation occurred. Because we do not reach that question, we need not address them.

B.

The district court dismissed Anderson's claims against the municipalities because it found no underlying constitutional violation. Although we do not decide that issue, Anderson's claims against the

municipalities still fail because they require a showing of deliberate indifference on the part of the municipalities. *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Municipalities "cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established." *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 393 (8th Cir. 2007) (en banc). As we have explained, although this case is undeniably tragic, Anderson has not alleged the violation of a clearly established right and he therefore cannot show deliberate indifference on the part of any municipality.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

William Anderson, *As Trustee for the Next-of-Kin of Jacob William Anderson (deceased)*

Plaintiff,

v.

City of Minneapolis; County of Hennepin; Hennepin Healthcare System, Inc.; Dr. Brian Mahoney, M.D., *as then-Medical Director of HCMC Ambulance Service*; Shana D. York, Anthony J. Buda, Raul A. Ramos, and John Doe individuals to be determined, *Individual Fire Department Personnel in Their Individual Capacities*; Daniel F. Shively and John Doe individuals to be determined, *Individual HCMC Ambulance Services Personnel in Their Individual Capacities*; Mitchel Morey, M.D., Individual Medical Examiner's Personnel, in His Individual Capacity; Daniel J. Tyra, Shannon L. Miller, Dustin L. Anderson, Scott T. Sutherland,

File No. 16-cv-04114 (SRN/FLN)

MEMORANDUM OPINION AND ORDER

(Filed Mar. 30, 2018)

D. Blaurat, Emily Dunphy, Christopher Karakostas, Matthew George, Joseph McGinness, Calvin Pham, Arlene M. Johnson, Matthew T. Ryan, and John Doe individuals to be determined, *Individual Police Officers in Their Individual Capacities*,

Defendants.

Robert R. Hopper, Robert R. Hopper & Associates, 333 South 7th Street, Suite 2450, Minneapolis, MN 55402, for Plaintiff.

Ivan M. Ludmer, Minneapolis City Attorney's Office, 350 South 5th Street, Room 210, Minneapolis, MN 55415, for Defendants City of Minneapolis; Individual Fire Department Personnel in Their Individual Capacities; Individual Police Officers in Their Individual Capacities: Daniel J. Tyra, Shannon L. Miller, Dustin L. Anderson, Scott T. Sutherland, D. Blaurat, Emily Dunphe, Christopher Karakostas, and Arelene M. Johnson.

Tracey N. Fussy, Minneapolis City Attorney's Office, 350 South 5th Street, Room 210, Minneapolis, MN 55415, for Defendant City of Minneapolis.

Michael B. Miller, Hennepin County Attorney's Office, 300 South 6th Street, Suite A-2000, Minneapolis, MN 55487, for Defendants County of Hennepin; Hennepin

Healthcare System, Inc.; Daniel F. Shively, Individual HCMC Ambulance Services Personnel in His Individual Capacity; Mitchel Morey, M.D., Individual Medical Examiner's Personnel, in His Individual Capacity; and Dr. Brian Mahoney, M.D., as then-Medical Director of HCMC Ambulance Service.

Ann E. Walther and Erik Bal, Rice, Michels & Walther, LLP, 10 South 2nd Street NE, Suite 206, Minneapolis, MN 55413, For Individual Police Officers in Their Individual Capacities Matthew George, Joseph McGinness, Calvin Pham, and Matthew T. Ryan.

SUSAN RICHARD NELSON, United States District Judge.

This is a very tragic case. Jacob Anderson, 19 years old at the time and a student at the University of Minnesota, was found in the frigid early morning hours of December 15, 2013, lying face down, slumped over a metal rail in a remote location in Minneapolis. The first responders declared him dead on the scene. The autopsy report states that the cause of death was hypothermia. The Plaintiff, Mr. Anderson's father and trustee for Jacob's next-of-kin, brings this lawsuit against a number of authorities and first responders, arguing that their actions in failing to take immediate measures to provide medical treatment to his son for hypothermia, including warming him, in hope that he was still alive, is actionable under 42 U.S.C. § 1983.

This matter is before the Court on: (1) a Motion to Dismiss Plaintiff's Second Amended Complaint

filed by Defendants County of Hennepin ("the County"), Hennepin Healthcare System, Inc. ("HHS"), Daniel Shively, Dr. Mitchel Morey, and Dr. Brian Mahoney (collectively, "County Defendants") (Cty. Defs.' Mot. [Doc. No. 96])[1]; (2) a Motion to Dismiss Plaintiff's Second Amended Complaint filed by Defendants City of Minneapolis ("the City"), Shana D. York, Anthony J. Buda, Raul A. Ramos, Daniel J. Tyra, Shannon L. Miller, Dustin L. Anderson, Scott T. Sutherland, D. Blaurat, Emily Dunphy, Christopher Karakostas, and Arlene M. Johnson (collectively, "City Defendants") (City Defs.' Mot. [Doc. No. 103]); and (3) identical Motions to Dismiss Plaintiff's Second Amended Complaint filed by Minneapolis Park and Recreation Board ("MPRB") Defendants Joseph McGinness and Calvin Pham [Doc. No. 108], and Mathew Ryan and Mathew George [Doc. No. 123]. Although this Court has great sympathy for Jacob's family, for the reasons set forth below and as detailed herein, these motions must be granted.

I. BACKGROUND

A. Factual Background

This Court assumes—as it must when evaluating a facial attack to jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and when ruling on a motion to dismiss under Rule 12(b)(6)—that all facts pleaded

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[1] The County Defendants submitted a letter after filing their Motion, clarifying that the Motion was brought on behalf of Mahoney as well, even though his name was inadvertently omitted from the briefing. (*See* Letter to District Judge [Doc. No. 102].)

in the complaint are true. *See Aten v. Scottsdale Ins. Co.*, 511 F.3d 818, 820 (8th Cir. 2008); *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914 (8th Cir. 2015); *see also infra*, Sections II.A.1 and II.B.1.

In the early morning hours of December 15, 2013, a passerby found then 19-year-old Jacob Anderson ("Anderson") lying face down, slumped over a metal rail in a remote location near a bridge in Minneapolis, Minnesota. (Second Am. Compl. [Doc. No. 86] at 11, ¶ 35.)[2] It was a very cold morning, with some reports indicating a wind chill temperature of -15° Fahrenheit. (*Id.* at 11, ¶ 34.) The circumstances of how Anderson arrived at this location are unknown. (*Id.* at 11, ¶ 37.) The night before, on December 14, he attended an "ugly sweater party" with his friends, fellow University of Minnesota students. (*Id.* at 10, ¶ 32.) Although Anderson was seen leaving the party at around 11:15 p.m., he did not return to his University of Minnesota dormitory that night. (*Id.* at 10–11, ¶¶ 32–33.)

After spotting Anderson, the passerby called 911. (*Id.* at 11, ¶ 38.) The 911 dispatcher sent to the scene the Minneapolis Fire Department ("MFD"), Hennepin County Medical Center ("HCMC") Ambulance Services/ Emergency Medical Services, and the Minneapolis Police Department ("MPD"). (*Id.*) What followed was a succession of responses by emergency personnel from the County, the City, and the MPRB that form the basis of this suit.

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[2] The Second Amended Complaint utilizes paragraph numbers 1–38 twice. To avoid confusion, citations to paragraphs within that range contain a page number as well.

MFD was the first to arrive on the scene at 8:54 a.m. (*Id.* at 16, ¶ 18.) Responders from the MFD included Defendants York, Buda, and Ramos (collectively, "Individual MFD Defendants"). (*Id.*) At least some of the Individual MFD Defendants were certified Emergency Medical Technicians who provide prehospital emergency medical care and transportation for patients who access emergency medical services. (*Id.* at 17, ¶ 19 & n. 6.) According to a witness on the scene, the Individual MFD Defendants assessed Anderson by conducting "a mere 30 second pulse check at his wrist, which was frostbitten and cold to the touch." (*Id.* at 17, ¶ 20.) After this assessment, MFD pronounced Anderson "dead on arrival." (*Id.*) The time was 8:57:24 a.m.—only three and a half minutes after MFD arrived on the scene. (*Id.* at 17, ¶ 21.)

The incident report that MFD prepared provides additional details. The report indicates that no "BLS," or basic life support, was provided. (*Id.* at 17, ¶ 24.) The report also states that Anderson "had no pulse and no breathing and was frozen indicating obvious death." (*Id.* at 17, ¶ 23.) It also indicates that the ambulance was "cancelled" at 8:57:24 a.m., and that police were called "per protocol." (*Id.* at 17, ¶¶ 22–23.)

At 8:56 a.m., about a minute and a half before MFD declared Anderson as "dead on arrival" and cancelled ambulance services, an HCMC ambulance unit

arrived on the scene.[3] (*Id.* ¶¶ 47, 53.) The HCMC responders included Defendant Shively and Anthony A. Van Beusekom (collectively "Individual HCMC Defendants").[4] (*Id.* ¶ 48.) When they arrived, Shively and Van Beusekom walked from the ambulance to Anderson's location and back to the ambulance again, but did not medically examine or assess Anderson or provide him with medical treatment. (*Id.* ¶ 52.) These Defendants "did not conduct their own assessment of [Anderson's] condition, or check for vital signs or core body temperature," or check for "pulse, breath, or airway ice formation." (*Id.* ¶ 54.) The Individual HCMC Defendants remained on the scene for approximately two minutes. (*Id.* ¶ 51.) After the incident, Shively prepared a report, which states that the HCMC ambulance had been "cancelled by other units on the scene." (*Id.* ¶ 55.) The report further states that there was a "frozen body near [the] river." (*Id.*) The Individual HCMC Defendants are overseen by the HCMC ambulance service Medical Director, who at that time was Defendant Mahoney. (*Id.* ¶ 56.)

The last of the emergency responders to arrive were from the MPD and MPRB. (*Id.* ¶ 93.) These responders, who arrived at 8:57 a.m., included Defendants

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[3] It is unclear why, after HCMC had already arrived on the scene, MFD cancelled ambulance services. (*See* Second Am. Compl. 17, ¶ 23.)

[4] Despite being mentioned in the body of the Second Amended Complaint, Van Beusekom is neither listed on the cover page nor described in the "Parties" section. (*See id.* at 3–9, ¶¶ 1–27.) He also does not appear as a party in ECF.

Tyra, Miller, Anderson, Sutherland, Blaurat, Dunphy, Karakostas, and Johnson (collectively "Individual MPD Defendants"), as well as MPRB Defendants George, McGinness, Pham, and Ryan.[5] (*Id.* ¶ 95.) Shortly after these Defendants arrived, MFD "relinquished control of the scene" and left. (*Id.* ¶ 97.) MPD then called for a "Car 701," which must be requested to the scene when the incident involves a suspicious death or homicide. (*Id.* ¶ 98.) About an hour and a half later, at 10:30 a.m., MPD also notified the Hennepin County Medical Examiner's Office ("Medical Examiner's Office") of Anderson's death. (*Id.* ¶ 102.)

Upon being notified, the Medical Examiner's Office sent two death investigators to the scene. (*Id.* ¶ 109.) Once on the scene, these investigators called the Assistant Medical Examiner, Defendant Morey, to discuss the case. (*Id.* ¶ 112.) Morey is a medical doctor and a board-certified forensic pathologist. (*Id.*) On this call, Morey determined that a medical doctor's visit to the scene was not necessary, and the Medical Examiner's Office took no further action while the investigators were on the scene. (*Id.* ¶ 113.)

Eventually, the Medical Examiner's Office performed an autopsy on Anderson's body. (*Id.* ¶ 121.) The autopsy report, which was signed by Morey, indicates that Anderson's immediate cause of death was

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[5] Although the Second Amended Complaint lists George, McGinness, Pham, and Ryan as MPD officers, (*see id.* ¶ 95), these Defendants aver that they are actually employed by the MPRB, (*see* McGinness & Pham's Mem. [Doc. No. 112] at 2 n.2; Ryan & George's Mem. [Doc. No. 126] at 2 n.2).

hypothermia. (*Id.*) The date and time of death are listed as December 15, 2013, 8:48 a.m. (*Id.*)

On the basis of the aforementioned facts, the present action was initiated.

B. Procedural Background

1. Plaintiff's Complaints

On December 8, 2016, a few days short of the three-year anniversary of Anderson's death, Anderson's parents, William Anderson ("William") and Kristi Anderson ("Kristi"),[6] filed the First Complaint against the various entities and individuals who responded to Anderson's death. (*See* First Compl. [Doc. No. 1] ¶¶ 4–30.) In addition to listing William and Kristi as plaintiffs in their individual capacities, the First Complaint also listed William in his capacity as personal representative of Anderson's estate. (*Id.* ¶¶ 1–3.) Though not relevant here, that First Complaint alleged one count under federal law and twelve counts under state law. (*Id.* ¶¶ 92–251.)

On March 9, 2017, by then more than three years and two months after Anderson's death, William was appointed trustee for the next-of-kin of Anderson. (Second Am. Compl. at 3, ¶ 1.) On March 24, 2017, the First Amended Complaint was filed, now listing as sole

[6] This Court always prefers to refer to litigants by their last names. However, because Jacob Anderson is referred to as "Anderson" throughout this Order, his parents William and Kristi Anderson will be referred to by their first names to avoid confusion.

plaintiff William in his capacity as trustee. (*See* First Am. Compl. [Doc. No. 43] ¶ 1.) On April 19, 2017, William filed a Second Amended Complaint, again in his capacity as trustee. (*See* Second Am. Compl.) That is now the operative pleading in this case, and it is in his capacity as trustee for Anderson's next-of-kin that William is referred to as "Plaintiff" throughout this Order.

The Second Amended Complaint alleges six counts under federal and state law. As the underlying basis for all claims is Defendants' alleged failure to recognize Anderson as a severe hypothermia victim and to render the medical help that Plaintiff alleges might have saved Anderson's life. The Second Amended Complaint generally alleges that Defendants "summarily pronounced [Anderson] dead, in complete and total contravention of their medical knowledge and their duties to provide appropriate medical assessment and response." (*Id.* ¶ 132.) Plaintiff alleges that this constitutes a failure to implement Defendants' "legally obligated standard operating procedures, and in particular, their respective department protocols for treating hypothermia victims." (*Id.*)

Counts I through IV allege violations under 42 U.S.C. § 1983 ("§ 1983"). (*See id.* ¶¶ 135–234.) Count I alleges a violation of Due Process under the Fourteenth Amendment. (*Id.* ¶ 135–64.) This Count alleges that the Individual MFD, HCMC, MPD and MPRB Defendants, as well as Morey and Mahoney, were deliberately indifferent to Anderson's life-threatening medical needs, which caused the deprivation of Anderson's constitutional rights to life, liberty, and personal

security under the Fourteenth Amendment. (*See id.*) Count II, asserted against these same Defendants, alleges "special relationship" violations under the Fourteenth Amendment. (*See id.* ¶¶ 165–77.) Plaintiff claims that "a special custodial relationship arose and attached when Jake Anderson was in [these Defendants'] custody and unable to seek other aid," and that such "special relationship created an affirmative duty to protect [Anderson's] life and provide him with care." (*Id.* ¶ 167.)

Count III is asserted against the City, the County, and Mahoney, and alleges deliberately indifferent training and supervision. (*See id.* ¶¶ 178–225.) Plaintiff claims that the City "has a policy, custom, practice and pattern of inadequate training and supervision" of the emergency response personnel employed by MFD and MPD. (*Id.* ¶ 183.) Plaintiff claims that the County also has a policy, custom, pattern, and practice of inadequate training and supervision of its emergency response personnel. (*Id.* ¶ 197.) Count III also makes claims against Mahoney, alleging that HCMC's "improper handling" of Anderson was the result of his improper training and negligent supervision of the Individual HCMC Defendants as then-Medical Director. (*Id.* ¶ 214.)

Count IV alleges municipal liability for negligent performance of duty by a state actor and is asserted against the Individual MFD, HCMC, MPD and MPRB Defendants as well as Morey. (*See id.* ¶¶ 226–34.) This Count alleges that these Defendants "failed to properly conduct their duties when they erroneously

and haphazardly pronounced [Anderson] dead after he was discovered cold in a cold environment with known symptoms of survivable hypothermia, without any reasonable medical support for their untimely declaration of [Anderson's] death." (*Id.* ¶ 232.)

Counts V and VI allege claims under state law against all Defendants. Count V asserts gross negligence, alleging that Defendants should have known that Anderson was the victim of hypothermia based on their extensive medical training, and that their failure to provide Anderson with medical treatment contravened established medical standards for treating survivable hypothermia. (*Id.* ¶¶ 238–40.) Finally, Count VI alleges negligent undertaking, claiming that a special duty arose when Defendants undertook to render emergency medical services to Anderson, and that Defendants breached this special duty by failing to render any such emergency medical assistance. (*Id.* ¶¶ 255–57.)

2. Defendants' Motions to Dismiss

On May 16, 2017, the County Defendants filed a Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim. The County Defendants argue that this Court lacks subject matter jurisdiction over the entire case because Plaintiff failed to comply with the requirements of Minnesota's wrongful death statute, Minn. Stat. § 573.02, which they argue governs all of his claims. (*See* Cty. Defs.' Mem. [Doc.

No. 98] at 9–13.) According to the County Defendants, that statute required Plaintiff to be appointed trustee within three years of Anderson's death. (*Id.*) Thus, because Plaintiff failed to comply with that requirement, they argue that he lacks standing to sue. (*Id.*) In the alternative, the County Defendants also move to dismiss under Rule 12(b)(6), arguing that Plaintiff has failed to properly plead his claims, and that, in any event, they are entitled to immunity. (*See id.* at 15–31.)

On May 17, 2017, the City Defendants also filed a Motion to Dismiss under Rules 12(b)(1) and 12(b)(6). Although the City Defendants frame their arguments slightly differently, like the County Defendants, they argue that this Court lacks subject matter jurisdiction because Plaintiff "failed to bring the lawsuit within three years of Anderson's death, a condition precedent under Minnesota's wrongful death statute, Minn. Stat. § 573.02." (*See* City Defs.' Mem. [Doc. No. 105] at 1–2, 7–11.) In the alternative, the City Defendants also argue that Plaintiff's claims must be dismissed under Rule 12(b)(6) because the Second Amended Complaint "fail[s] to assert sufficient facts to establish negligence or a constitutional deprivation," (*id.* at 2, 12–23), and because Plaintiff's claims are barred by various doctrines of immunity, (*see id.* at 12–15).

On May 17, 2017, Defendants McGinness and Pham also moved to dismiss the Second Amended Complaint under Rules 12(b)(1) and 12(b)(6). In a footnote, McGinness and Pham indicated that Defendants George and Ryan would join their Motion if Plaintiff timely served George and Ryan. (McGinness & Pham

Mem. at 2 n.2.) On June 21, 2017, Defendants George and Ryan filed a Motion to Dismiss, and a Memorandum in Support, that is identical to the one filed by McGinness and Pham. (*Compare* McGinness & Pham Mem., *with* George & Ryan Mem.) Accordingly, the Court will address these four Defendants' arguments collectively—referring to Defendants as the MPRB Defendants—but will only cite to McGinness and Ryan's briefing.

Like the County and City Defendants, the MPRB Defendants argue that this Court should dismiss the Second Amended Complaint because "Plaintiff failed to secure appointment as a wrongful death trustee within the three-year statute of limitations period," and as such lacks standing to assert any of the claims in this action. (McGinness & Pham Mem. at 7.) And again like the City and County Defendants, the MPRB Defendants argue that the Second Amended Complaint fails to state a claim upon which relief may be granted, and that even if it did, immunity bars the claims. (*See id.* at 7–15.)

II. DISCUSSION

Defendants' Rule 12(b)(1) Motions to Dismiss implicate subject matter jurisdiction, so this Court will consider them first. *See Frey v. City of Herculaneum*, 44 F.3d 667, 670 (8th Cir. 1995) ("We may not consider the parties' arguments as to whether the complaint states a cause of action until we have determined whether the plaintiffs have standing to recover under section

1983."); *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 958 (8th Cir. 2011) ("Federal jurisdiction is limited by Article III of the Constitution to cases or controversies; if a plaintiff lacks standing to sue, the district court has no subject-matter jurisdiction.").

A. Rule 12(b)(1) Motions

1. Standard of Review

Federal courts deciding a Rule 12(b)(1) motion must distinguish between a "facial attack" and a "factual attack" to jurisdiction. *Branson*, 793 F.3d at 914. Here, the parties bring a facial attack to jurisdiction, so "the court restricts itself to the face of the pleadings and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Id.* (quoting *Osborn*, 918 F.2d at 729 n. 6). On a motion to dismiss under Rule 12(b)(6), this Court "accept[s] as true the non-moving party's factual allegations and grant[s] the non-moving party all reasonable inferences from the pleadings." *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 981 (8th Cir. 2008).

Because Plaintiff's federal and state law claims implicate different issues, the Court will address them separately.

2. Jurisdiction over § 1983 Claims

Defendants argue that this Court lacks subject matter jurisdiction over Plaintiff's § 1983 claims because

he failed to comply with the requirements set forth in Minnesota's survival and wrongful death statutes, Minn. Stat. §§ 573.01–.02. (*See* Cty. Defs.' Mem. at 9–13; City Defs.' Mem. at 7–11; McGinness & Pham Mem. at 5–7.)[7] Specifically, Defendants contend that those statutes "govern" even his § 1983 claims and required him to bring this action in his capacity as trustee within three years of Anderson's death. (*See* City Defs.' Mem. at 7–11.) Because he failed to do so, Defendants argue, he lacks standing to sue. (*Id.*) In essence, Defendants' position calls for this Court to consider the extent to which it must look to Minnesota's survival law to determine whether it has jurisdiction over Plaintiff's federal claims.

The Supreme Court has repeatedly recognized that there are certain gaps in federal civil rights law. To fill those gaps, 42 U.S.C. § 1988 ("§ 1988") instructs courts "to turn to 'the common law, as modified and changed by the constitution and statutes of the [forum] State,' as long as these are "not inconsistent with the Constitution and laws of the United States." " *Robertson v. Wegmann*, 436 U.S. 584, 588 (1978) (alteration in original) (quoting 42 U.S.C. § 1988). One of the gaps in federal law relates to the survival of civil rights actions under § 1983. *Id.* at 589. In *Robertson v. Wegmann*, the Supreme Court held that under § 1988's "borrowing" mandate, "state statutory law, modifying the common

[7] As stated above, although Defendants frame their arguments slightly differently, in effect, their position is the same. Accordingly, the Court addresses their Motions collectively, but will cite primarily to the City Defendants' Memorandum.

law, provides the principal reference point in determining survival of civil rights actions" so long as that state law is not inconsistent with the Constitution or federal law. *Id.* at 589–90 (footnote omitted). In that case, the Supreme Court concluded that a Louisiana federal district court should have looked to Louisiana state survival law to determine whether an existing § 1983 action survived the plaintiff's death, and, if so, who would be the proper party to continue prosecuting the action. *Id.* at 590–92.

The Eighth Circuit has consistently construed *Robertson* as requiring federal courts to apply state law to determine "who" may bring a § 1983 action upon the death of the injured party. For example, in *Andrews v. Neer*, the Eighth Circuit stated:

> Under § 1983, state actors who infringe the constitutional rights of an individual are liable to the party injured. The appropriate plaintiff is obvious when a party survives his injuries, but the language of § 1983 makes no mention of permissible plaintiffs when the injured party dies. . . . [I]n this situation we look to state law to determine who is a proper plaintiff, as long as state law is not inconsistent with the Constitution or federal law.

253 F.3d 1052, 1056 (8th Cir. 2001) (internal citations and quotation marks omitted) (citing *Robertson*, 436 U.S. at 588–90). In that case, the Eighth Circuit considered whether a daughter could bring a § 1983 action arising out of the death of her father. *Id.* at 1056–58. The relevant Missouri wrongful death statute

provided that "the spouse or children or the surviving lineal descendants" could sue for damages when injuries sustained by the decedent caused the decedent's death. *Id.* at 1058 (quoting Mo. Rev. Stat. § 537.080). The Eighth Circuit held that "[it] look[s] to Missouri's wrongful death statute solely for the purpose of establishing whether Andrews[,] [the decedent's daughter,] ha[d] standing to bring th[e] § 1983 action." *Id.* at 1058 n.4. The Eighth Circuit held that the Missouri wrongful death statute gave "Andrews standing as an individual to assert an action for personal injuries to her father resulting in his death," and as such she "ha[d] standing to bring th[e] § 1983 action." *Id.* at 1058. Similarly, in *Williams v. Bradshaw*, the Eighth Circuit considered whether the plaintiff had standing to bring § 1983 claims arising out of her mother's death. 459 F.3d 846, 847–49 (8th Cir. 2006). The Eighth Circuit noted that "[u]nder Arkansas law a wrongful-death action may be brought only by a personal representative or, if there is no personal representative, by the decedent's heirs at law." *Id.* at 848 (citing Ark. Code. Ann. § 16-62-102(b)). Accordingly, the Eighth Circuit concluded that the plaintiff lacked standing to file her original complaint because she was not a personal representative and had not included as plaintiffs all of the decedent's heirs. *Id.* at 849.

These cases clearly counsel that this Court must look to Minnesota's survival and wrongful death statutes solely for the purpose of ascertaining "who" may bring a § 1983 action under the circumstances of this case. Minn. Stat. § 573.01 provides that "[a] cause of

action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in section 573.02." Minn. Stat. § 573.02 ("§ 573.02"), in turn, provides that a duly-appointed trustee may bring two types of actions. Subdivision 1, titled "Death action," provides in relevant part that

> When death is caused by the wrongful act or omission of any person . . . , *the trustee* appointed as provided in subdivision 3 may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission.

Minn. Stat. § 573.02, subdiv. 1 (emphasis added). Similarly, subdivision 2, titled "Injury action," provides that

> When injury is caused to a person by the wrongful act or omission of any person . . . and the person thereafter dies from a cause unrelated to those injuries, *the trustee* appointed in subdivision 3 may maintain an action for special damages arising out of such injury if the decedent might have maintained an action therefor had the decedent lived.

Minn. Stat. § 573.02, subdiv. 2 (emphasis added). Because this statutory scheme gives a trustee standing to bring claims sounding in wrongful death, personal injury on behalf of the decedent, or both, under *Robertson* and its progeny, that trustee also has standing to bring § 1983 claims. Here, Plaintiff was appointed trustee for Anderson's next-of-kin by a judge in Hennepin County,

and thus this Court holds that he has standing to bring the § 1983 claims.

Defendants would have this Court reach a different conclusion, but their arguments are unavailing. They turn this Court's attention to the three-year statute of limitations for wrongful death actions under § 573.02, subdivision 1. (*See* City Defs.' Mem. at 7–11.) In relevant part, that subdivision provides that "[a]n action to recover damages for a death caused by the alleged professional negligence of a physician . . . [or his or her employee] shall be commenced within three years of the date of death," and that "[a]ny other action under this section," except one arising from murder, "may be commenced within three years after the date of death provided that the action must be commenced within six years after the act or omission." Minn. Stat. § 573.02, subdiv. 1. Defendants assert that as interpreted by Minnesota state courts, the statute's three-year suit-commencement period is not an ordinary statute of limitations, but rather a "separate jurisdictional condition precedent on wrongful death actions" that functions to deprive Plaintiff of standing in this case. (*See* City Defs.' Mem. at 8.)

In support of their position, Defendants primarily rely on the Minnesota Supreme Court case of *Ortiz v. Gavenda*, 590 N.W.2d 119 (Minn. 1999) (en banc). In *Ortiz*, the Minnesota Supreme Court considered whether the amendment and relation back principles generally applicable to pleadings applied to wrongful death claims brought under § 573.02. 590 N.W.2d at 120. In that case, the plaintiff brought a wrongful death action

against the parties involved in a vehicle collision that resulted in her husband's death. *Id.* The plaintiff filed her original complaint less than two years after the death of her husband, but did not obtain trustee status until more than three years had elapsed since his death. *Id.* at 120–21. After her appointment as trustee, the plaintiff sought to amend her original complaint to reflect the appointment, and because the statute of limitations had run, she argued that the amendment should relate back to the date of the original complaint. *Id.* at 121. The Minnesota Supreme Court disagreed. The court noted that "the limitation provisions in a statutorily created cause of action are jurisdictional, requiring dismissal for failure to comply," and not subject to any exceptions. *Id.* at 122. The court held that because the plaintiff had not filed her original complaint in her capacity as trustee, that initial complaint was a "legal nullity," and thus nothing existed to which the attempted amendment could "relate back." *Id.* at 123 (quoting *Regie de l'assurance Auto. du Quebec v. Jensen*, 399 N.W.2d 85, 92 (Minn. 1987)). The plaintiff's claims were thus time-barred. The Minnesota Supreme Court concluded by noting that for over 100 years, it has consistently interpreted "Minn. Stat. § 573.02's time limit as a strict condition precedent to maintaining a wrongful death action." *Id.*

While *Ortiz* and related cases are relevant to Plaintiff's ability to bring his state law claims, *see infra*, they are not dispositive of this Court's analysis of § 1983 standing. The opening paragraph of *Ortiz* expressly states that its review is limited to whether

principles associated with *statutes of limitations*—amendment and relation back—apply to the wrongful death statute. 590 N.W.2d at 120. This issue is wholly distinct from standing. *See Popp Telecom, Inc. v. Am. Sharecom, Inc.*, 361 F.3d 482, 490 (8th Cir. 2004) ("Generally, courts apply the relation-back doctrine with reference to statutes of limitations.").[8] *Ortiz* is thus inapposite, because as explained above, *Andrews, Williams*, and related cases indicate that courts borrow from state survival law only to determine "who" may assert § 1983 claims arising from another's death. *See, e.g.*, *Archer v. Preisser*, 723 F.2d 639, 640 (8th Cir. 1983) (per curiam) (concluding that Iowa law granted standing to bring a survival action only to the legal representative or successor in interest of the deceased, and thus a guardian for the decedent's children did not have standing to bring a § 1983 action).

In fact, in a highly relevant case, the Eighth Circuit recently considered whether a father appointed as a special administrator of his deceased son's estate could bring a § 1983 action in Minnesota. *Estate of Guled v. City of Minneapolis*, 869 F.3d 680 (8th Cir.

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[8] That Minnesota courts label compliance with the three-year statute of limitations a "strict condition precedent" to bringing suit is of no consequence. "The fundamental aspect of standing is that it focuses on *the party* seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. . . . In other words, when standing is placed in issue in a case, the question is whether the *person* whose standing is challenged is a *proper party* to request an adjudication of a particular issue. . . ." *Flast v. Cohen*, 392 U.S. 83, 99–100 (1968) (emphasis added).

2017). The Eighth Circuit held that he could not, as he was not a wrongful death trustee under § 573.02. *Id.* at 683–85. The Court held that "[t]he wrongful death statute—not the probate statute—governs § 1983 standing." *Id.* at 684 (citing *Robertson*, 436 U.S. at 589). The Court went on to hold that "only a person who has standing to bring a claim under § 573.02 has standing to bring a § 1983 action," and because the plaintiff was not a wrongful death trustee under § 573.02, he did not have standing to pursue a § 1983 claim. *Id.* Although the Eighth Circuit did not have occasion to consider the relevance of § 573.02's three-year statute of limitations to the case, nothing in its analysis indicates that this issue would have been relevant to the issue of § 1983 standing. In fact, the court noted that "[b]ecause the three-year statute of limitations on [plaintiff's] Minnesota wrongful death claim had expired, [he] (through counsel) filed a complaint in federal district court under 42 U.S.C. § 1983." *Id.* at 683. Albeit stated in dictum, this shows the distinct difference between a wrongful death *state* action and a § 1983 suit.[9] The *Guled* court plainly stated that "[a]s a trustee, [plaintiff] would have standing to pursue a § 1983 claim."

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[9] Significantly, if the three-year suit commencement period implicated federal subject matter jurisdiction, as Defendants contend, the Eighth Circuit could have raised the issue *sua sponte.* A "court has a special obligation to consider whether it has subject matter jurisdiction in every case. This obligation includes the concomitant responsibility to consider *sua sponte* [the court's subject matter] jurisdiction . . . where . . . [the court] believe[s] that jurisdiction may be lacking." *Hart v. United States*, 630 F.3d 1085, 1089 (8th Cir. 2011) (alterations in original) (internal citations and quotations omitted).

Id. at 685. In short, neither in *Guled* nor in any other precedent has the Eighth Circuit indicated that state survival law is relevant for anything other than ascertaining *who* may assert a § 1983 claim after a decedent's death. Stated more broadly, this Court finds no support in federal case law for Defendants' proposition that courts deciding a § 1983 action should defer to a state's rules regarding the statute of limitations contained in its wrongful death statute.

And for good reason. It is well established that courts borrow from an entirely different state statute to determine the limitations period applicable to § 1983 claims. *Wilson v. Garcia*, 471 U.S. 261, 266 (1985), *superseded by statute on other grounds by* 28 U.S.C. § 1658(a) *as recognized in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377–81 (2004). In *Wilson v. Garcia*, noting the absence of federal law containing a specific statute of limitations for § 1983 actions, the Supreme Court interpreted § 1988's borrowing mandate as a "directive to select, in each State, the *one* most appropriate statute of limitations for *all* § 1983 claims." *Id.* at 275 (emphasis added). And concluding that Congress "would have characterized § 1983 as conferring a general remedy for injuries to personal rights," the *Wilson* Court held that "§ 1983 claims are best characterized as personal injury actions" for statute of limitations purposes. *Id.* at 278–80.

A few years after *Wilson*, the Supreme Court considered which statute of limitations would apply to § 1983 claims in states with multiple statutes of limitations for personal injury actions. *Owens v. Okure*, 488

U.S. 235 (1989). In *Owens v. Okure*, the Supreme Court held that in such a case, courts should borrow "the residual or general personal injury statute of limitations" of the forum state. *Id.* at 236. Thus, as the Eighth Circuit has repeatedly recognized, under *Wilson* and *Owens, all* § 1983 actions filed in Minnesota are subject to the six-year statute of limitations contained in the state's personal injury statute, Minn. Stat. § 541.05, subdivision 1(5). *Egerdahl v. Hibbing Cmty. Coll.*, 72 F.3d 615, 618 n. 3 (8th Cir. 1995); *see also Anunka v. City of Burnsville*, 534 F. App'x 575, 576 (8th Cir. 2013) (per curiam).

Notwithstanding *Wilson* and *Owen*'s [sic] clear directives that the statute of limitations applicable to all § 1983 claims filed in Minnesota is six years, and that this period has not yet expired, Defendants urge this Court to hold that Plaintiff's federal claims are time-barred. In an attempt to reconcile their position with *Wilson* and *Owens*, Defendants argue that Minnesota's wrongful death statute "retains" the proper six-year statute of limitations, so "[it] continues to apply here, together with the condition precedent for bringing wrongful death suits within three years of death." (City Defs.' Reply [Doc. No. 131] at 17.) The critical flaw in Defendants' arguments is that they ask this Court to apply Minnesota's survivorship and wrongful death law to § 1983 cases *wholesale.* (*See id.* at 16 ("If 'state survival statutes govern survival of personal injury actions,' then Minnesota's survival statute bars this action because Plaintiff attempted to bring it as trustee more than three years after Plaintiff's death." (quoting

Andrews, 253 F.3d at 1056–57)); *id* at 17 ("[T]his Court should apply Minnesota's survivorship law to § 1983 cases.").) That is not the law. Under *Guled, Andrews, Williams*, and related cases, this Court must look to Minnesota's survival law only for the purposes of determining standing, or "who" may bring § 1983 claims after a decedent's death.[10] And under *Wilson* and *Owens*, this Court looks to Minnesota's personal-injury statute to determine the statute of limitations period that applies to those actions.[11] The Eighth Circuit has followed this approach in numerous cases decided after *Wilson*. *See, e.g.*, *DeVries v. Driesen*, 766 F.3d 922, 923 (8th Cir. 2014) ("In *Wilson v. Garcia*, the Supreme Court held that the state statute of limitations for personal injury torts was the appropriate period of limitations for *all* § 1983 cases." (emphasis added)); *Ketchum v. City of W. Memphis*, 974 F.2d 81, 82 (8th Cir. 1992) ("[T]he Supreme Court held that § 1983 claims . . . are to be governed by th[e] state's general personal-injury statute of limitations, not by particular state statutes covering particular torts.").

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[10] After the Eighth Circuit issued the *Guled* opinion, Defendants filed a letter arguing that it supported their position. (Defs.' Letter to the District Judge [Doc. No. 134]; *see also* Pl.'s Letter to the District Judge [Doc. No. 135].) For the reasons already described, *Guled* does not support Defendants' position.

[11] That is also why, more fundamentally, Defendants' argument that Minnesota's wrongful death statute "retains" a six-year statute of limitations is flawed. Under *Wilson*, the fact that § 573.02 "retains" a six-year limitations period, as Defendants contend, even if true, is irrelevant. No limitations period from that statute could apply to a § 1983 case.

It should also be noted that Defendants' position is contrary to *Wilson*'s objectives of furthering the "federal interests in uniformity, certainty, and the minimization of unnecessary litigation." 471 U.S. at 275. Were this Court to adopt Defendants' arguments and defer to the rules established by Minnesota courts regarding the statute of limitations applicable to § 573.02 suits, § 1983 actions to recover damages for wrongful death would be subject to different limitations periods depending on the facts of the case. For instance, although Minnesota law provides that most actions for wrongful death must be brought within three years of the decedent's death, cases involving murder are subject to an exception. *See Huttner v. State*, 637 N.W.2d 278, 283 (Minn. Ct. App. 2001). This "murder exception" provides that "[a]n action to recover damages for a death caused by an intentional act constituting murder may be commenced at any time after the death of the decedent." *Id.* (quoting Minn. Stat. § 573.02, subdiv. 1) (holding that a plaintiff-trustee's claims were not barred by her failure to serve certain defendants within three years of the decedent's death). Thus, if this Court were to defer to Minnesota courts' rules regarding the various limitations periods applicable to wrongful death actions, § 1983 plaintiffs alleging wrongful death caused by murder would not be subject to the three-year suit commencement "condition precedent" to bringing suit. *Wilson* sought to foreclose this type of case-by-case determination of the limitations period by announcing a bright-line rule. *See Wilson*, 471 U.S. at 273–74. Accordingly, this Court holds that

because the applicable six-year limitations period has not yet expired, Plaintiff's § 1983 claims are timely.

This Court's conclusion is fully supported by a decision of a federal district court within this District, *Baxter-Knutson v. Brandt*, No. 14-3796 (ADM/LIB), 2015 WL 4633590 (D. Minn. Aug. 3, 2015). In *Baxter-Knutson*, the plaintiff's son committed suicide while in custody at the Stearns County Jail. *Id.* at *1–2. More than three years later, the plaintiff was appointed trustee for her son's next-of-kin under § 573.02. *Id.* at *2. Two months later—by then almost four years after her son's death—the plaintiff filed a complaint seeking recovery of damages under § 1983. *Id.* The defendants brought a motion for summary judgment, arguing that the three-year limitations period for claims arising under § 573.02 had expired. *Id.* at *3. The court denied the motion. *Id.* at *5. It concluded that the plaintiff had standing to bring § 1983 claims by virtue of § 573.02, and that her claims were timely under Minn. Stat. § 541.05, subdivision 1(5), which "governs the limitations period for § 1983 claims in Minnesota" *Id.* at *4–5. The *Baxter-Knutson* court conducted a thorough analysis of *Robertson, Wilson*, and *Owens*, and, like this Court, concluded that "[t]here is no support" in the text of *Wilson* or *Owens* for the notion that the plaintiff's § 1983 action should have been brought within three years of the decedent's death. *Id.* The *Baxter-Knutson* court stressed that subsequent Eighth Circuit cases support the proposition that "*Wilson* and *Owens* extended their statute of limitations reasoning to wrongful death suits," and that other circuits have similarly

declined to draw a distinction between § 1983 claims for wrongful death and other § 1983 actions. *Id.* at *5 (collecting cases).

Defendants contend that *Baxter-Knutson* was wrongly decided. (*See, e.g.*, City Defs.' Mem. at 8.) They argue that *Baxter-Knutson* erroneously "separated the requirements in Minn. Stat. § 573.02 that a trustee be appointed, and that the appointed trustee bring suit within three years, calling the former a standing issue and the latter a statute of limitations issue." *Id.* Indeed, *Baxter-Knutson* separated these requirements. But it was correct in doing so because that is precisely the approach that the Supreme Court has instructed courts to take. In § 1983 actions, "[courts] look to state law to determine who is a proper plaintiff," *Guled*, 869 F.3d at 683 (quoting *Andrews*, 253 F.3d at 1056), and "[w]ith regard to the limitations period, the law could not be more straightforward: courts look to the state personal injury statute of limitations and its attendant tolling provisions." *Ray v. Maher*, 662 F.3d 770, 774 (7th Cir. 2001). "When" a plaintiff must file a § 1983 suit, therefore, has nothing to do with Minnesota's wrongful death statute, as this Court and *Baxter-Knutson* have concluded.

In sum, this Court concludes that Plaintiff has standing to assert the § 1983 claims contained in his Second Amended Complaint even though he was appointed trustee more than three years after Anderson's death. Moreover, because the six-year statute of limitations has not yet expired, Plaintiff's § 1983 claims

are timely. Accordingly, this Court has jurisdiction over Counts I–IV of the Second Amended Complaint.

3. Jurisdiction over State Law Claims

Defendants contend that Plaintiff's state law claims —gross negligence and negligent undertaking—are also governed by Minn. Stat. §§ 573.01–.02 and should likewise be dismissed because Plaintiff failed to bring them as trustee within three years of Anderson's death. (City Defs.' Mem. at 9–11; City Defs.' Reply at 18–21; McGinness & Pham Reply [Doc. No. 130] at 5–6.) Plaintiff responds that he did not plead wrongful death, and thus § 573.02 is irrelevant to his state law claims. He argues that even his state law claims are subject to the six-year statute of limitations that govern his § 1983 claims. (Pl.'s Opp'n [Doc. No. 128] at 24–26.) To reach that conclusion, Plaintiff asserts that because his federal and state law claims "together encompass one 'constitutional case'" under principles of supplemental jurisdiction, and because this Court must apply federal procedural law to the entire case, all his claims are subject to the same six-year statute of limitations. (*Id.*) In the alternative, Plaintiff argues that were this to Court [sic] conclude that a three-year statute of limitations applies to his state law claims, those claims "relate back" to the date he filed his First Complaint (which was within three years of Anderson's death). (*Id.* at 27–30.)

a. Applicable Statute of Limitations

This Court's subject matter jurisdiction over Plaintiff's Second Amended Complaint is based on federal question jurisdiction for the § 1983 claims, Counts I–IV, and on supplemental jurisdiction for the state law claims, Counts V–VI. *See* 28 U.S.C. § 1367; *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966). Under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), state substantive law governs claims over which a federal court exercises supplemental jurisdiction. *See Witzman v. Gross*, 148 F.3d 988, 990 (8th Cir. 1998) (citing *Gibbs*, 383 U.S. at 726). Accordingly, while federal law provides the substantive law for Plaintiff's § 1983 claims and the procedural law for the entire case, state law provides the substantive law for Plaintiff's state law claims.

At the outset, this Court concludes that Plaintiff's two state law claims—negligence and negligent undertaking—are governed by Minn. Stat. § 573.02 despite Plaintiff's failure to plead them as wrongful death claims. As explained above, Minnesota law provides that "a cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in section 573.02." Minn. Stat. § 573.01. Counts V and VI allege injury to Anderson; thus, Plaintiff may only assert those claims as part of an action under § 573.02. *Cf. Stuedemann v. Nose*, 713 N.W.2d 79, 83 (Minn. Ct. App. 2006) (setting forth the elements that a party must prove in a negligence-based wrongful death action).

Turning now to the critical question presented—which statute of limitations applies—this Court concludes that Counts V and VI are subject to the three-year limitations period contained in § 573.02. The statute of limitations applicable to state law claims is undoubtedly a matter of state substantive law. *See Erie*, 304 U.S. at 64; *Guar. Tr. Co. v. York*, 326 U.S. 99, 110 (1945); *Saxton v. ACF Indus., Inc.*, 254 F.3d 959, 961–62 (11th Cir. 2001) (en banc) ("Alabama law provides the applicable statute of limitations" for federal court sitting in diversity deciding state law claims); *Larsen v. Mayo Med. Ctr.*, 218 F.3d 863, 866 (8th Cir. 2000) ("Minnesota's substantive law, including its statute of limitations, applies."). And as discussed at length above, claims under § 573.02 must be brought by a court-appointed trustee within three years of the decedent's death unless murder is involved. Accordingly, because Plaintiff did not bring Counts V and VI as trustee within three years of Anderson's death, his claims would be time-barred unless they can relate back to a timely complaint.

b. Relation Back

Plaintiff contends that Counts V and VI relate back to the date of the First Complaint. (*See* Pl.'s Opp'n. at 27–28.) He argues that federal law, namely, Federal Rule of Civil Procedure 15, governs and allows relation back. (*Id.* at 27, 29.) Plaintiff cites two Eighth Circuit cases, *Russell v. New Amsterdam Casualty Co.*, 303 F.2d 674 (8th Cir. 1962), and *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413 (8th Cir. 1967), where

relation back was allowed, for the general proposition that "[c]ourts have routinely allowed changes in the legal capacity in which plaintiffs bring suit without requiring the filing of a new complaint or facing statute of limitations bars." (*Id.* at 28–29). He argues that in so doing, "courts reason that defendants are put on adequate notice by the filing of a complaint and that the change in capacity does not effect a material substantive change to the complaint," presumably referring to the relation back analysis under Rule 15(c)(3). (*Id.*) Defendants do not explicitly state whether they challenge Plaintiff's position that Rule 15 applies. (*See, e.g.*, City Defs.' Reply at 20–21.) However, they reiterate that under Minnesota law, the First Complaint was a "legal nullity," and therefore cannot serve as the foundation for an amendment. (*Id.*)

At the outset, this Court agrees with Plaintiff that federal law controls the issue of relation back. While this Court would ordinarily conduct a choice-of-law analysis under *Erie* and its progeny, the Eighth Circuit has already held that "the issue of relation back is one of procedure and is controlled by the Federal Rules of Civil Procedure." *Crowder*, 387 F.2d at 416 (relying on *Russell*, 303 F.2d at 680–81, and *Hanna v. Plumer*, 380 U.S. 460 (1965)); *see also Estate of Butler ex rel. Butler v. Maharishi Univ. of Mgmt.*, 460 F. Supp. 2d 1030, 1040 (S.D. Iowa 2006).[12] Nevertheless, this Court

[12] The Court notes that at least one subsequent Eighth Circuit opinion considering relation back "prefer[red] to engage in the *Hanna* analysis anew rather than rely on the authority of *Crowder*" for the proposition that Federal Rule of Civil Procedure

agrees with Defendants that even applying federal procedural law, Counts V and VI do not relate back to Plaintiff's First Complaint, as that complaint was "no[t] a valid action to which [Plaintiff's] amended complaint could relate back." *Capers v. Nat'l R.R. Passenger Corp.*, 673 F. App'x 591, 594 (8th Cir. 2016).

Two Eighth Circuit cases guide this Court's analysis. The first, which is directly on-point, is *Williams v. Bradshaw*, already mentioned above. Relevant here, in addition to holding that the plaintiff lacked § 1983 standing, *Williams* also considered whether the district court had abused its discretion in denying the plaintiff's motion to amend her original complaint. *Id.* at 849. To cure the standing defect, the plaintiff sought to amend her original complaint to reflect her new status as special administrator of the decedent's estate, which would allow her to bring her claims. *Id.* By then, however, the limitations period had run. *Id.* at 848. The Eighth Circuit held that the district court had properly denied the plaintiff's motion to amend, as granting it "would have been impossible." *Id.* at 849 (citing *Jones ex rel. Jones v. Corr. Med. Servs.*, 401 F.3d 950, 952 (8th Cir. 2005)). The Eighth Circuit reasoned that because the plaintiff lacked standing when she filed her

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15(c) supplies the rule of decision for relation back questions. *Brown v. E.W. Bliss Co.*, 818 F.2d 1405, 1408 n.2 (8th Cir.), *adhered to by*, 831 F.2d 810 (8th Cir. 1987). The rationale for doing so was that the federal rule was more restrictive than the state rule in that case, which created the possibility that applying the federal rule would impair state substantive rights. *Id.* These concerns are not present here, since application of the federal rule is not more restrictive than application of the state rule.

original complaint, that complaint was "null." *Id.* The Court stated, "When, as here, a complaint amounts to a nullity, it cannot serve as the foundation for an amendment: Since the original complaint was without legal effect, there was nothing to amend." *Id.* The plaintiff's claims were thus time-barred.

Albeit under slightly different factual circumstances, the Eighth Circuit reached the same conclusion in *Capers v. National Railroad Passenger Corp.* In *Capers*, the plaintiff filed suit against Amtrak alleging that she had been sexually assaulted by an Amtrak porter. 673 F. App'x at 592. Within the statute of limitations, the plaintiff filed her complaint under the pseudonym "Jane Doe No. 49." *Id.* She had not, however, sought leave from the district court to proceed anonymously. *Id.* at 592–93. It was only after the statute of limitations had expired that she filed an amended complaint disclosing her identity. *Id.* at 593. Before the Eighth Circuit, the plaintiff argued, *inter alia*, that her amended complaint related back to her original filing under Federal Rule of Civil Procedure 15. *Id.* at 593–94. The Eighth Circuit disagreed. First, it noted that although it "generally appl[ies] federal law on procedural matters like amendability, [it] defer[s] to state law as to considerations that form an integral part of the state statute of limitations, at least in the absence of a federal rule directly on point." *Id.* at 594 (internal quotation marks and citations omitted). Applying this principle, the Eighth Circuit concluded that Arkansas law controlled and precluded relation back. *Id.* But particularly relevant here, the

Eighth Circuit also concluded that "even if the direct-conflict analysis of *Hanna v. Plumer* . . . required [it] to apply Federal Rule 15, there would be no valid action to which [the plaintiff's] amended complaint could relate back." *Id.* That was because "[u]nder Federal Rule 10(a), she failed to initiate a valid action at least until she sought to amend her complaint, by which time the statute of limitations had run, as she was not properly before the court until then, if at all." *Id.* at 594–95.

Williams and *Capers* thus counsel that Rule 15 does not permit relation back when there is "no valid action" which can serve as the foundation for an amendment. Applying that principle here, it is not possible for Counts V and VI of Plaintiff's Second Amended Complaint to relate back to the date of the First Complaint because that complaint was not a "valid" action: Plaintiff lacked standing to bring any of the state claims asserted therein because he was not a court-appointed trustee. *Cf. Mandacina v. United* States, 328 F.3d 995, 1000 (8th Cir. 2003) ("The relation back doctrine allows untimely claims to be deemed timely by treating the claims as if they had been filed when the timely claims were filed.") Although Plaintiff filed his First Complaint on December 8, 2016, a few days short of the three-year anniversary of Anderson's death, he did not obtain trustee status until March 9, 2017—by then more than three years and two months after Anderson's death. Accordingly, as in *Williams* and *Capers*, Counts V and VI cannot relate back to the date of the

First Complaint because that complaint is not a valid foundation for relation back purposes.[13]

The Court acknowledges that this result is opposite to that reached by the Eighth Circuit in *Crowder*, which the Plaintiff relies on in support of his position. *Crowder*, however, precedes *Williams* and *Capers* and is distinguishable. In *Crowder*, the plaintiff filed a complaint in federal district court seeking damages for the wrongful death of her husband. 387 F.2d at 414. At that time, the applicable Missouri statute provided that wrongful death actions were subject to a one-year limitations period. *Id.* at 415. The statute further provided that "[t]he surviving spouse ha[d] the right to institute the action within six months after the death of the deceased," but that if she failed to do so, the surviving minor children could institute the action within the one-year limitations period. *Id.* (citing *Forehand v. Hall*, 355 S.W.2d 940 (Mo. 1962)). The plaintiff originally filed her complaint in her capacity as "administratrix of the estate of the decedent," and although she filed it within a year of her husband's death, she did not file it within six months. *Id.* at 414–15. After the one-year limitations period had expired, the plaintiff amended her complaint to reflect her status as "mother and next friend" of the decedent's two minor children. *Id.* at 414. The Eighth Circuit considered whether the

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[13] The Court notes that although Plaintiff in fact amended his First Complaint twice, Defendants have always stated their position that any amendments would not relate back because the First Complaint was a "nullity." (*See* City Defs.' Letter to the District Judge [Doc. No. 35].)

amended complaint related back to the date of the original complaint. *Id.* at 415–19. Applying Federal Rules of Civil Procedure 15 and 17, the court held that the amended complaint related back. *Id.*

Although *Crowder* permitted relation back, the critical distinction here is the validity of the original complaint. In contrast to *Williams* and *Capers, Crowder* in no way indicated that the original complaint was without legal effect under state law. To the contrary, the Eighth Circuit noted that it was "firmly established that . . . the action was filed within the time fixed by Missouri law for the commencement of wrongful death actions by children of the party wrongfully killed." *Id.* at 415. This case presents an entirely different situation. Under Minnesota law, Plaintiff's First Complaint "ha[d] no legal effect." *Ortiz*, 590 N.W.2d at 123. Thus, here, unlike in *Crowder*, there simply was no valid action instituted before the expiration of the statute of limitations.[14]

In sum, this Court concludes that Counts V and VI of the Second Amended Complaint are untimely and

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[14] The Court notes that the result would be the same had it concluded that Minnesota rules, and not the Federal Rule of Civil Procedure, control. In *Ortiz*, the Minnesota Supreme Court held that Minnesota Rules of Civil Procedure 15.03 and 17.01 do not allow for relation back when the complaint filed within the statute of limitations is not brought by a duly-appointed trustee. 590 N.W.2d at 122–124. Thus, Minnesota law would undoubtedly preclude relation back in this case. *See Regie*, 399 N.W.2d at 92.

that they do not relate back to the date of the First Complaint. Accordingly, they are dismissed.[15]

Having found jurisdiction over Plaintiff's § 1983 claims, the Court now addresses Defendants' arguments advanced under Federal Rule of Civil Procedure 12(b)(6).

B. Rule 12(b)(6) Motions

1. Standard of Review

When evaluating a motion to dismiss under Rule 12(b)(6), the Court assumes the facts in the complaint to be true and construes all reasonable inferences from those facts in the light most favorable to the plaintiff. *Hager v. Arkansas Dep't of Health*, 735 F.3d 1009, 1013 (8th Cir. 2013). The Court, however, need not accept as true wholly conclusory allegations, *Hanten v. Sch. Dist. of Riverview Gardens*, 183 F.3d 799, 805 (8th Cir. 1999), or legal conclusions that plaintiffs draw from the facts pled, *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for

[15] Because this Court dismisses Counts V and VI as untimely, it need not address Defendants' alternative arguments as to these claims, *e.g.* service and official immunity.

the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). A complaint must contain facts with enough specificity "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

2. Section 1983 Claims Against the Individual Defendants—Counts I & II

Morey, Mahoney, and the Individual MFD, HCMC, MPD and MPRB Defendants (all collectively, "Individual Defendants") are sued in their individual capacities.[16] (*See* Second Am. Compl. at 5–9, ¶¶ 7–24). They move to dismiss Counts I–II for failure to state a claim upon which relief may be granted and under the doctrine of qualified immunity. (*See* Cty. Defs.' Mem. at 15–31; Cty. Defs.' Reply at 8–9; City Defs.' Mem. at 15–23; McGinness & Pham Mem. at 7–14). Because district courts have an obligation to "resolv[e] immunity questions at the earliest possible stage in litigation," *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam), this Court will analyze qualified immunity at the outset.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable

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[16] Morey and Mahoney are also sued in their official capacities. *See infra.*

person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity is an affirmative defense that a plaintiff need not anticipate to state a claim. *See Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996); *see also Jackson v. Schultz*, 429 F.3d 586, 589 (6th Cir. 2005). However, if the defense is raised on a 12(b)(6) motion, it will be upheld if the immunity is established "on the face of the complaint." *Bradford v. Huckabee*, 394 F.3d 1012, 1015 (8th Cir. 2005); *see also Weaver v. Clarke*, 45 F.3d 1253, 1255 (8th Cir. 1995). Thus, the Individual Defendants are entitled to qualified immunity unless this Court determines that (1) Counts I and II state a plausible claim for a violation of a constitutional right, and (2) that right was "clearly established at the time of the alleged infraction." *Hager*, 735 F.3d at 1013–14; *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery."). This Court has discretion to decide which of these two prongs it analyzes first. *Pearson*, 555 U.S. at 236.

a. Violation of a Constitutional Right

Counts I and II allege that the Individual Defendants violated Anderson's "substantive due process right to life and . . . bodily integrity" secured by the Fourteenth Amendment. (Second Am. Complaint ¶ 151; *see also* ¶ 172.) Specifically, Plaintiff alleges that the

Individual Defendants violated Anderson's substantive due process rights by failing to perform an adequate medical assessment and by failing to render any medical treatment when they encountered him. (*Id.* ¶ 241.) In so doing, Plaintiff avers, the Individual Defendants contravened well-established medical protocols and operating procedures derived from the well-known medical axiom that "a person is not dead until they are warm and dead." (*Id.*) Plaintiff argues that the Individual Defendants thus deprived Anderson "of his Constitutional right to life and bodily integrity, and denied his chance of survival." (*Id.* ¶ 81.)

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court held that the "[Due Process] Clause is phrased as a limitation on the State's power to act," and thus "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." 489 U.S. 189, 195–96 (1989). Thus, *DeShaney* established that the government has no general constitutional duty to provide police protection or other similar protective services. *See Gladden v. Richbourg*, 759 F.3d 960, 964 (8th Cir. 2014) (citing *DeShaney*, 489 U.S. at 196).

There are, however, two exceptions to this general rule. First, pursuant to the "custody" exception, "when

the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney*, 489 U.S. at 199–200; *accord Montgomery v. City of Ames*, 749 F.3d 689, 694 (8th Cir. 2014). Second, under the "state-created danger" exception, a similar constitutional duty arises when the state itself creates or amplifies the danger to which an individual is exposed. *Fields v. Abbott*, 652 F.3d 886, 891 (8th Cir. 2011); *Montgomery*, 749 F.3d at 694. Even in these situations, however, state officials are liable for breaching this duty "only if their actions are so egregious or outrageous as to 'shock the contemporary conscience.'" *Dodd v. Jones*, 623 F.3d 563, 567 (8th Cir. 2010) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)).

The Individual Defendants argue that Plaintiff's Second Amended Complaint fails to state a violation of Anderson's due process rights—and thus that they are entitled to qualified immunity—because neither of the two *DeShaney* exceptions were triggered in this case. (*See, e.g.*, City Defs.' Mem. at 15–20.) They argue that Plaintiff alleges no facts from which this Court could reasonably infer that Anderson was in their custody, or that they affirmatively created or exacerbated the danger that Anderson faced that day. (*Id.*) Absent a constitutional duty to act, the Individual Defendants argue, they cannot be held liable under the Due Process Clause. (*Id.*) Plaintiff disagrees. (Pl.'s Opp'n at 36–70.) He argues that he has plausibly pled both that the Individual Defendants held Anderson in "functional"

custody, (*id.* at 44–49), and that they increased the danger to him, (*id.* at 49–61).

This Court must begin its analysis by stating clearly again that the circumstances of this case are very tragic. A young university student was found by a passerby out in the cold, exposed to sub-zero ambient temperatures. As any other good citizen might do, the passerby called on the state to help. The young man, however, was declared dead on the scene, despite the possibility that he might still have been alive. This Court has enormous sympathy for the Anderson family's loss, but it nevertheless must conclude that Plaintiff has not stated a claim for a violation of Anderson's substantive due process rights. Almost certainly, Plaintiff has stated a claim for negligence, or even gross negligence.[17] But even construing all reasonable inferences in Plaintiff's favor, his Second Amended Complaint fails to plausibly allege a substantive due process violation.

First, Plaintiff has not plausibly alleged that the Individual Defendants created or amplified the danger to Anderson. The state-created danger theory requires that state officials "act[] affirmatively to place someone in a position of danger *that he or she would not otherwise have faced*" before a constitutional duty to render protective services will arise. *S.S. v. McMullen*, 225 F.3d 960, 962 (8th Cir. 2000) (en banc) (emphasis added) (holding that complaint was properly dismissed

[17] As described, *supra*, however, Plaintiff's state law claims are barred by the statute of limitations.

where the state returned a child to an already existing dangerous environment, concluding that such conduct was effectively the same as "do[ing] nothing"); *see also Carlton v. Cleburne Cty.*, 93 F.3d 505, 508–09 (8th Cir. 1996) (collecting cases where liability has been found under the state-created danger theory, noting that in all of them, "the individuals would not have been in harm's way but for the government's affirmative actions"). Here, there simply is no allegation that state actors were involved in the circumstances that led to Anderson's exposure to the cold in the first instance. This is not a case like *Riordan v. City of Joliet*, which Plaintiff relies on, where police officers affirmatively took the plaintiff outdoors, exposing him to sub-zero temperatures. 3 F. Supp. 2d 889, 892 (N.D. Ill. 1998). In *Riordan*, police officers removed the plaintiff from an ostensibly warm environment, transported him in the back of their squad car, and then released him onto the street, knowing he lacked adequate clothing and was intoxicated. *Id.* at 894–95. The *Riordan* court denied the officers' motion for summary judgment on qualified immunity grounds, concluding, *inter alia*, that the officers had affirmatively "*placed* Riordan in a manifestly dangerous position." *Id.* at 895 (emphasis added).

Nor has Plaintiff plausibly alleged that the Individual Defendants increased Anderson's vulnerability to the cold. Plaintiff argues that the Individual Defendants increased the risk to Anderson by "continuing to keep [his] body exposed to the cold for an additional two hours, declining to offer necessary medical assistance, and preventing help from reaching him." (Pl.'s

Opp'n at 52.) In essence, Plaintiff's argument is that the Individual Defendants did not *decrease* the risk to Anderson. That may very well be inferred. But failing to avert danger is quite distinct from affirmatively increasing danger or one's vulnerability to danger. *See Jackson v. City of Joliet*, 715 F.2d 1200, 1202–06 (7th Cir. 1983) (concluding that there was no liability where officers did not create danger but merely failed to avert it by not rescuing decedents from a burning car). Here, the Individual Defendants in effect did nothing; they retained the *status quo.* Such inaction, however, when standing alone, although likely negligent, does not trigger liability under the state-created danger theory. *See Dodd*, 623 F.3d at 568 (finding no substantive due process violation where some police conduct led to risks to plaintiff that were "[no] greater than if the officers had retained the *status quo* upon their arrival"); *see also Avalos v. City of Glenwood*, 382 F.3d 792, 799–800 (8th Cir. 2004) (affirming summary judgment in favor of defendants because they did not place party claiming injury "in any greater danger than he otherwise would have faced"); *Montgomery*, 749 F.3d at 695 (no state-created danger where plaintiff merely alleged that defendants had "failed to timely respond to [her] medical needs" after she had been shot); *Carlton*, 93 F.3d at 509 ("To impose an affirmative duty to protect the general public from a situation created by the processes of nature would be to impose upon a county an impossible burden.")

Similarly, this Court concludes that Anderson was not in the custody of Defendants so as to trigger the

corresponding duty to protect. Courts have construed the custody exception narrowly, and the Eighth Circuit has held that "*DeShaney*-type liability can only be imposed 'when the State by the affirmative exercise of its power so *restrains* an individual's liberty that it renders him unable to care for himself.'" *Burton v. Richmond*, 370 F.3d 723, 728 (8th Cir. 2004). For example, in *Lee v. Pine Bluff School District*, dismissed at the pleadings stage, the Eighth Circuit held that a student was not in state custody during a school-sponsored band trip. 472 F.3d 1026, 1031 (8th Cir. 2007). In evaluating whether the decedent was in the state's custody, the court looked to whether his attendance was compulsory, whether he was prohibited from leaving, or whether he was prohibited from contacting his family or seeking help. *Id.* Because there was no sign of any restraint, the court held that the student's voluntary participation in the trip did not involve a custodial relationship. *Id.* Here, as in *Lee*, Plaintiff does not allege any facts from which this Court could infer that the Individual Defendants restrained Anderson or affirmatively prohibited him from seeking aid.

Notwithstanding the narrow reach of the custody exception, Plaintiff urges this Court to infer that a custodial relationship existed here because the Individual Defendants undertook to render aid to Anderson and he relied on them "to adequately perform their promised duties of care to protect his life and provide him with competent medical care." (Second Am. Compl. ¶ 168.) But *DeShaney* explained that the affirmative duty to protect under the custody exception "arises not

from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitations which it has imposed on his freedom to act on his own behalf through imprisonment, institutionalization, or other similar restraint of personal liberty." 489 U.S. at 200. As already described, Plaintiff alleges no facts from which this Court could infer that Anderson's freedom to act on his own behalf was limited in any way. Plaintiff only states that Anderson's ability to act on his own behalf was limited because he was unconscious and in need of medical help.

Those circumstances, however, do not render the situation custodial. For instance, in a case with similar facts, the Sixth Circuit held that an unconscious man was not in custody, and therefore was not deprived of his due process rights when he died after being placed in an ambulance. *See Jackson*, 429 F.3d at 590–91. The decedent in that case was suffering from a gunshot wound and had fallen unconscious when an ambulance arrived on the scene. *Id.* at 588. First responders loaded the man into the ambulance, where they "watched him die" without providing any life support or attempting to take him to a trauma center, in contravention of their department policies. *Id.* Nonetheless, the court held that

> the EMTs did nothing to restrain decedent. The EMTs did not cause decedent to be shot nor did they render him unconscious. There is no allegation that the EMTs restrained or handcuffed the decedent. There is no allegation

> that the decedent was not free to leave the ambulance or be removed from the ambulance. Decedent's liberty was "constrained" by his incapacity, and his incapacity was in no way caused by the defendants.

Id. at 591. Similarly, the Individual Defendants in this case are not alleged to have constrained Anderson's liberty by handcuffing him or applying some other restraint. Anderson's liberty was regrettably constrained by his incapacity, which was not caused by the Individual Defendants.

For all of the aforementioned reasons, this Court is similarly unpersuaded by Plaintiff's contention that Anderson was under custody because the Individual Defendants "created a situation depriving [Anderson] of any alternative avenue of rescue." (Pl.'s Opp'n. at 47.) Plaintiff argues that the custody exception broadly applies to situations where state actors "cut off alternative sources of aid," relying on *Martin v. Shawano-Gresham Sch. Dist.*, 295 F.3d 701, 708 (7th Cir. 2002), and *Bynum v. City of Magee*, 507 F. Supp. 2d 627, 632 (S.D. Miss. 2007). (Pl.'s Opp'n at 46–47.) While the proposition that affirmatively cutting off alternative sources of aid could evince custodial restraint may be true generally, it has no application here. First, the cases Plaintiff cites only affirm the general principle that the rationale for the custody exception is that the state would transgress "the substantive limits . . . set by the Eighth Amendment and the Due Process Clause" if it restrains an individual, rendering him unable to care for himself—including by seeking aid from others—

and yet declines to provide for his basic human needs. *DeShaney*, 489 U.S. at 200; *see Martin*, 295 F.3d at 632 (state-created danger case merely stating general rule that the state has no duty to protect unless "[it] has custody of a person, thus cutting off alternate avenues of aid, or if the state somehow created the danger of harm"); *Bynum*, 507 F. Supp. 2d at 633 (holding that no custodial relationship existed where plaintiff's son committed suicide at home several days after being taken there by police). Second, and more fundamentally, there is no allegation here that someone on the scene in fact attempted to assist Anderson and was prohibited from doing so. *See Dodd*, 623 F.3d at 567 (no custodial relationship where there was no showing that plaintiff "could have removed himself from the roadway, or that a passersby would have moved him out of [harm's way]" if the officers had not arrived on the scene). This Court cannot speculate, as Plaintiff suggests, that "any bystander or other individual arriving on [the] scene would have been prevented from approaching Jake, as the MPD would have prevented such incursion." Pl.'s Opp'n at 47–48; *see Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." (internal citations omitted)).[18] Simply, there is no indication here that

[18] Plaintiff argues that "[t]he fact that the MFD responders called off the paramedics' response to the scene is evidence that these defendants acted affirmatively to cut off alternative sources of aid to Jake." (Pl.'s Opp'n at 47.) But the Second Amended Complaint states that the paramedics, the Individual HCMC Defendants,

Anderson was in "custody" as that term is construed in *DeShaney* and its progeny.

Finally, even assuming that Plaintiff had plausibly alleged that the Individual Defendants had a constitutional duty to provide aid to Anderson, the Second Amended Complaint nevertheless faces an insurmountable hurdle: the conduct alleged is not sufficiently "conscience-shocking" to give rise to a substantive due process violation. *Avalos*, 382 F.3d at 800. "In order to succeed, a complaint for a violation of substantive due process rights must allege [state] acts that shock the conscience." *S.S.*, 225 F.3d at 964. "Actionable substantive due process claims involve a level of abuse of power so brutal and offensive that they do not comport with traditional ideas of fair play and decency." *Avalos*, 382 F.3d at 800 (alterations and quotation marks omitted); *see also Moran v. Clarke*, 296 F.3d 638, 647 (8th Cir. 2002) (substantive due process violations involve conduct "so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience" (alterations in original)). "To shock the conscience, . . . an official's action must either be motivated by an intent to harm or, where deliberation is practical,

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arrived nonetheless and in fact approached Anderson's body. (Second Am. Compl. at ¶¶ 47–49.) There is no allegation that had the Individual HCMC Defendants wished to assess Anderson, they would have been prevented from doing so by the MFD Individual Defendants. *See Montgomery*, 749 F.3d at 696.

demonstrate deliberate indifference." *Montgomery*, 749 F.3d 689, 695.

Plaintiff does not allege that the Individual Defendants acted with intent to harm; rather, he argues that they acted with deliberate indifference and thus their behavior shocks the conscience. (Pl.'s Opp'n. at 55–61.) Plaintiff highlights operating procedures that he argues mandated that the Individual Defendants initiate medical treatment upon encountering Anderson, and that their failure to follow them indicates deliberate indifference. (*Id.* at 58.) As just one example, Plaintiff alleges that § 9-105.01 of the MFD Standard Operating Procedures states that CPR must begin "immediately when patient is found cold in a cold environment," and that an automated external defibrillator should be applied "when a breathless, pulseless patient does NOT have signs of obvious trauma consistent with death." (Second Am. Compl. at 19, ¶ 27.) He similarly points to § 9-104.03.04, which states that hypothermic patients must be rewarmed and that MFD should be "aggressive" with hypothermic arrests. (*Id.*) Plaintiff makes similar claims against the HCMC Defendants, (*see, e.g.*, *id.* ¶ 74), the MPD and MPRB Defendants, (*see id.* ¶¶ 103–08), Mahoney, (*id.* ¶¶ 157–63), and Morey, (*id.* ¶¶ 113–21). In all, Plaintiff argues that the Individual Defendants "had time to make an unhurried judgment in this situation," "knew of the potential for hypothermia in cold weather conditions," should have understood that medically "a person cannot be declared dead unless he is warm," yet "consciously disregarded [Anderson] and created a great

risk of serious harm when they left him exposed to the cold." (*Id.* ¶¶ 125–28, 156.)

Even accepting Plaintiff's factual allegations as true, and drawing all inferences in his favor, the Second Amended Complaint certainly adequately pleads negligence and perhaps even gross negligence, but it falls short of plausibly alleging deliberate indifference. Deliberate indifference requires both that the state actors "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," and that they actually draw that inference. *Montgomery*, 749 F.3d at 695 (quoting *Hart v. City of Little Rock*, 432 F.3d 801, 805–06 (8th Cir. 2005)). To be sure, Plaintiff has plausibly pled that the Individual Defendants knew or should have known that hypothermia victims may appear deceased even though they are actually alive. And this Court could likewise infer that these Defendants perhaps should have done more before readily pronouncing Anderson dead on arrival. But this Court finds no factual allegations in Plaintiff's Second Amended Complaint from which it could infer that any of the Individual Defendants *in fact* recognized that Anderson might still be alive and yet "deliberately decided not to protect [him] from a known substantial risk of serious harm." *Beck v. Wilson*, 377 F.3d 884, 891 (8th Cir. 2004). To the contrary, Plaintiff asserts that it was the Individual Defendants' subjective *failure* to recognize that Anderson was a victim of hypothermia that amounts to the due process violation. (*See e.g.*, Pl.'s Opp'n at 59 ("While the individual officers may claim to have believed Jake was dead, all

of the medical literature on hypothermia, its pathophysiology and its effects on the body, would lead to the *objectively reasonable conclusion* that Jake was a viable patient deserving and in need of emergency medical care, including rewarming.") (emphasis added).) Again, at most, the Individual Defendants' alleged failure of judgment states a claim for negligence, even gross negligence, but it does not state a claim for deliberate indifference. *See S.S.*, 225 F.3d at 964 (explaining that under the deliberate indifference standard, negligence, or even gross negligence, does not suffice).

This reasoning applies to all of the Individual Defendants. The Individual MFD Defendants were first to arrive on the scene. These Defendants did not ignore Anderson; they conducted a pulse check and determined that he was not breathing and had no pulse. They also observed that Anderson had "scrapes and cuts on his hand which appeared suspicious." (*See* Aff. of Tracey Fussy, Ex. 1 [Doc. No. 18-1], MFD Run Report at 2.)[19] While MFD Standard Operating Procedures dictate that hypothermia victims should be given medical treatment, they also caution against disturbing a crime scene, including moving the body of a deceased individual unless necessary. (*See* Decl. of Ivan Ludmer,

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[19] On a motion to dismiss, this Court may consider the pleadings, "some public records, materials that do not contradict the complaint, [and] materials that are 'necessarily embraced by the pleadings.' " *Noble Systems Corp.*, 543 F.3d at 982 (quoting *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)). Plaintiff's Second Amended Complaint embraces the reports and operating procedures referenced and quoted here. (*See, e.g.*, Second Am. Compl. at 24, ¶ 24.)

Ex. A [Doc. No. 106-1], MFD Standard Operating Procedures § 12-102.03.) Although hindsight might suggest that these Defendants should have recognized that Anderson *might* still be alive, and that they possibly weighed signs of potential foul play more heavily than they should have, their behavior does not indicate deliberate indifference.

The same can be said about the rest of the Individual Defendants. The Individual HCMC Defendants—the next group to arrive on the scene—walked over to where Anderson lay, noted that there was a "frozen body near [the] river," (*id.* ¶ 55), and deferred to MFD's determination that Anderson was deceased. True enough, one might question why these trained paramedics declined to conduct an independent evaluation of Anderson. But as in *DeShaney*, "[t]he most that can be said of the[se] [Defendants] . . . is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." 489 U.S. at 203. Even crediting Plaintiff's contentions that these Defendants "summarily accepted the MFD's conclusion that Jake Anderson was 'dead on arrival', paying no heed to their own duty to perform a full and complete patient assessment, ignoring their specific knowledge regarding hypothermia victims in the field, and failing to transport Jake Anderson to the HCMC Emergency Room," (Second Am. Compl. ¶ 79), the most that can be said is that these allegations state a claim for gross negligence. As for the Individual MPD and MPRB Defendants, MPD reports likewise indicate not only that Anderson appeared to be "frozen to death" and had a

"blue" skin color, but that he had "[s]mall cuts/ scratches . . . on his face, hands[,] and . . . exposed legs," and that he was lying on "a snow-covered rock pile near the river with his torso resting on a metal fence." (Aff. of Tracey Fussy, Ex. 3 [Doc. No. 18-3], MPD Case Report at 4, 7.) Again, the most that can be said is that these Defendants, in light of all the facts available to them, were grossly negligent in failing to question whether Anderson *might* still be alive. As for Morey and Mahoney, who were not even on the scene, it is difficult to see how they could have been deliberately indifferent to Anderson's particular needs.

In sum, the collective response by the Individual Defendants as pled may state a claim for negligence, even gross negligence, when construed most favorably to Plaintiff. But "[l]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process, and the Constitution imposes no obligation on the State to provide perfect or even competent rescue services." *Dodd*, 623 F.3d at 568 (internal citations omitted). Indeed, "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation cannot under our cases be condemned." *Farmer v. Brennan*, 511 U.S. 825, 838 (1970) (holding that the deliberate indifference standard is a subjective, not objective, test). More to the point, courts categorically hold that "failure to rescue" claims alleging inadequate, or even totally absent, medical treatment are not actionable under § 1983 absent a custodial relationship or a state-created danger. *See, e.g.*, *Brown v. Commonwealth of*

Pa. Dep't of Health Emergency Med. Servs. Training Inst., 318 F.3d 473, 478 (3d Cir. 2003) ("[T]here is no federal constitutional right to rescue services, competent or otherwise."); *Weeks v. Portage Cty. Exec. Offices*, 235 F.3d 275, 278 (6th Cir. 2000) (absent either of the *DeShaney* exceptions, "the victim has no constitutional right to have the police provide medical assistance or intervene to protect him from the actions of private actors.") This Court would, however, be remiss not to note that "[i]t may well be that, by voluntarily undertaking to protect [Anderson] against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger." *DeShaney*, 489 U.S. at 201–02. But as arguably condemnable as Defendants' conduct may be in hindsight, "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 202

b. Clearly Established Right

In light of its conclusion that Plaintiff has not plausibly alleged that the Individual Defendants violated Anderson's substantive due process rights, this Court need not reach the question of whether the rights claimed to have been infringed were clearly established at the time of Anderson's death. *See Avalos*, 382 F.3d at 801. And because the Second Amended Complaint does not state a violation of a constitutional right, the Individual Defendants are entitled to qualified immunity. Accordingly, all § 1983 claims asserted

against the Individual Defendants in their individual capacities are dismissed with prejudice. *See Moore ex rel. v. Briggs*, 381 F.3d 771, 775 (8th Cir. 2004).

3. Section 1983 Claims Against the Municipalities—Counts III & IV

Plaintiff asserts two claims against the governmental entities that employ the Individual Defendants. Count III alleges that the City, the County, and Mahoney provided deliberately indifferent training and supervision.[20] (*See* Second Am. Compl. ¶¶ 178–225.) Count IV, titled "Municipal Liability for Negligent Performance of Duty by State Actor," is asserted against Morey and the Individual MFD, HCMC, MPD and MPRB Defendants.[21] (*Id.* ¶¶ 226–34.)

There are several ways municipalities may be held liable under § 1983. "Section 1983 liability for a constitutional violation may attach to a municipality if the violation resulted from (1) an official municipal policy; (2) an unofficial custom; or (3) a deliberately indifferent failure to train or supervise." *Atkinson, v. City of Mountain View*, 709 F.3d 1201, 1214 (8th Cir. 2013) (quotation marks and citations omitted). Unconstitutional

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[20] Mahoney is sued in his official capacity as well as in his individual capacity. (Second Am. Compl. at 5, ¶ 7.) "[A] suit against a public official in his official capacity is actually a suit against the entity for which the official is an agent." *Parrish v. Ball*, 594 F.3d 993, 997 (8th Cir. 2010) (alterations and quotation marks omitted).

[21] Like Mahoney, Morey is sued in his official capacity. (Second Am. Compl. at 5, ¶ 8.)

policy, custom, or failure to train claims against a municipality are often called "*Monell* claims" after *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). In *Monell*, the Supreme Court decided "that a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Municipalities may not be held liable under § 1983 for injuries caused by their agents or employees on a theory of vicarious liability like *respondeat superior*. *Id*.; *see also Atkinson*, 709 F.3d at 1214; *Parrish*, 594 F.3d at 997; *Brockinton v. City of Sherwood*, 503 F.3d 667, 674 (8th Cir. 2007). Consistent with these principles, the Eighth Circuit has repeatedly "recognized a general rule that, in order for municipal liability to attach, individual liability first must be found on an underlying substantive claim." *McCoy v. City of Monticello*, 411 F.3d 920, 922 (8th Cir. 2005); *see also Brockinton*, 503 F.3d at 674.

Under this framework, Counts III and IV fail as a matter of law. Because this Court has concluded that the Second Amended Complaint does not plausibly allege that any of the Individual Defendants violated Anderson's constitutional rights, the governmental entities involved cannot be held liable "on either an unconstitutional policy or custom theory or on a failure to train or supervise theory." *McVoy*, 411 F.3d at 922–23 (dismissing the plaintiff's *Monell* claims against a municipality where there was no individual § 1983 liability against the officers); *Avalos*, 382 F.3d at 802 (holding that the court's decision that the officers were

entitled to qualified immunity " 'necessarily resolve[d]' the remaining claims in the municipal defendants' favor," as "there must be an unconstitutional act by the municipal employee before the municipality is liable" (quoting *Lockridge v. Bd. of Trs. of the Univ. of Ark.*, 315 F.3d 1005, 1013 (8th Cir. 2003) (en banc)); *see also City of Canton*, 489 U.S. at 385 ("[O]ur first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation."). Accordingly, Count III and IV must be dismissed.[22]

III. ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED THAT**:

1. Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) filed by Defendants County of Hennepin, Hennepin

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[22] To the extent that Count III is asserted against Mahoney in his individual capacity, he is not subject to liability for the same reason. "[A] supervising officer can be liable for an inferior officer's constitutional violation only 'if he directly participated in the constitutional violation, or if his failure to train or supervise the offending actor caused the deprivation.' " *Parrish*, 594 F.3d at 1001 (quoting *Otey v. Marshall*, 121 F.3d 1150, 1155 (8th Cir.1997)). Moreover, Count IV cannot reach the municipalities to the extent it is asserted against the Individual MFD, HCMC, MPD and MPRB Defendants, as they were sued only in their individual capacities. To reach a municipality, a plaintiff must bring a § 1983 claim against a specific agent or employee in his or her official capacity. *See id.*

Healthcare System, Inc., Daniel Shively, Dr. Mitchel Morey, and Dr. Brian Mahoney [Doc. No. 96] is **GRANTED as detailed herein**;

2. Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) filed by Defendants City of Minneapolis, Shana D. York, Anthony J. Buda, Raul A. Ramos, Daniel J. Tyra, Shannon L. Miller, Dustin L. Anderson, Scott T. Sutherland, D. Blaurat, Emily Dunphy, Christopher Karakostas, and Arlene M. Johnson [Doc. No. 103] is **GRANTED as detailed herein**;

3. Motions to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) filed by Defendants Joseph McGinness and Calvin Pham [Doc. No. 108], and Mathew Ryan and Mathew George [Doc. No. 123], are **GRANTED as detailed herein**; and

4. This action is **DISMISSED WITH PREJUDICE** in its entirety.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 30, 2018

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge