No. 19-

IN THE

Supreme Court of the United States

THE ESATE OF SWANNIE HER, *et al.*,

Petitioners,

v.

CRAIG HOEPPNER, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition poses two questions: first, whether the state-created danger doctrine provides a due process claim; and second, what level of culpable intent imposes liability on state created dangers that inflict harm?

1. If a state creates a danger that causes the loss of life, liberty or property, is it a violation of the due process clause of the Fourteenth Amendment protecting life, liberty and property from state deprivation without due process of law?

2. If a state creates a danger that causes the loss of life, liberty or property, is the state liable under the Fourteenth Amendment if the state knew of or were aware of the danger and failed to take reasonable protections against the danger, even if they did not act with criminal intent to cause injury?

PARTIES TO THE PROCEEDINGS

Petitioners in this proceeding are as follows: The Estate of Swannie Her, Connie Her, Chong Her, Ekin Her (a minor), Jasmine Her (a minor), Alexander Hernandez (a minor), Evangelin Her (a minor), Chuexng Her (a minor), Thvon Her (a minor), Jovanyel Ramirez-Chang (a minor), Jhovanny Ramirez-Chang (a minor), and Chueve Her (a minor).

Respondents in this proceeding are as follows: The City of West Bend, Kraig Sadownikow, Craig Hoeppner, Ryan Zamrow, Brogan Zochert, Michela Millard, Cassidy Holbrook, Noah Wilkens, Madeline Kaphingst, Abigail Ehmke, and the League of Wisconsin Municipalities Mutual Insurance Company.

RELATED CASES

Estate of Swannie Her, et al. v. Kraig Sadownikow, et al., No. 17-CV-1015 U.S. District Court for the Eastern District of Wisconsin. Judgement entered on October 30, 2018.

The *Estate of Swannie Her, et al. v. Craig Hoeppner, Parks Director for the City of West Bend, et al.*, No. 18-3524 U.S. Court of Appeals for the Seventh Circuit. Judgement entered September 26, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Estate of Swannie Her, et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit

OPINIONS BELOW

The Seventh Circuit opinion below is published at 939 F.3d 872 and attached at Appendix 1a. The district court's opinion is unpublished attached at Appendix 12a.

JURISDICTION

The Federal Circuit entered judgment on September 26, 2019. The Court has jurisdiction under 28 U.S.C. 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The defendants created a dangerous attraction then invited the public to pay to partake in it, promised safety for young children, then failed to take the most basic reasonable precautions for the protection of young children, that led to the death of a seven-year-old girl on a summer day in Wisconsin. The defendants disclaimed responsibility on grounds the state-created-danger doctrine did not apply to their conduct.

The defendants created a man-made aquatic attraction called the Regner Park Pond for the public that they promoted as safe for small children to swim in. App., *infra*, 13a. The defendants promoted the swimming pond as a children's play area and charged parents to allow their children access. App., *infra*, 3a.The defendants marked an area for swimming and promised to provide trained lifeguards focused on protecting small children to justify the fee charged and expenditure of tax resources for the man-made aquatic attraction. *Id.*

On June 11, 2016, seven-year old Swannie Her's mother paid for her entrance to the park. App., *infra*, 14a. Unbeknownst to Swannie, the area of the pond marked for public swimming actually had hidden drop-offs just a few feet in that could easily drown her, and the pond was too murky to see these drop-offs. App., *infra*, 22a. This "deep well" was known to the defendant, but not marked or advertised to the public. *Id.* Additional safeguards ignored by the defendants that day included lifeguards monitoring access to the "deep well" area of the pond, lifeguards requiring swim tests and visible wristbands before allowing young children access to the swimming

pond, and lifeguards monitoring small children swimming at all times. App., *infra*, 3a.

After entry into the pond, Swannie slipped underwater unnoticed by the lifeguards, and Swannie's lifeless body was found only a few feet from the most dangerous area of the Murky pond, a "deep well", at approximately 5:55 PM by an adult patron walking through chest-high murky water. App., *infra*, 4a. Swannie had been in and out of the water for approximately 40 minutes without a single lifeguard noticing her before she died. *Id.*

Defendants' own expert admitted that the state created an "inherently dangerous" activity for young children. App., *infra*, 7a. Additionally, uncontroverted evidence showed Defendants violated their own most basic rules for protecting the safety of young children. Lifeguards were required to enforce the rules: 1) that all swimmers wear wristbands and 2) that an adult must accompany children under the age of five at all times and must be within arm's reach. Those two rules were in place to ensure the safety of children. App., *infra*, 3a-5a, 9a, 22a. If a child is in the water and is five years or younger with no adult within arm's length, the lifeguards must remove the child from the water. App., *infra*, 23a. No swimmer was allowed in water over their arm pits without a swim test wristband. App., *infra*, 3a-4a. The swim test wristband was only issued to patrons who passed a mandatory swim test; child or adult. *Id.* Watching small children was a mandatory requirement for all lifeguards at the Murky pond. App., infra, 9a, 22a.

United States Magistrate Judge Nancy Joseph issued the lower court's decision and order granting Defendants'

motion for summary judgment on October 30, 2018. App., *infra*, 27a. The District court found as a matter of law that "the evidence is insufficient for a jury to conclude that the defendants created the danger to Swannie" App., *infra*, 21a. The court further found "[t]he evidence is also insufficient to show that the defendants increased the danger to Swannie." App., *infra*, 22a. Finally, the court concluded that Plaintiffs had not shown conduct on the part of the state that shocks the conscience. App., *infra*, 25a.

Finding that there was no Constitutional injury, the lower court dismissed Plaintiffs' Constitutional claims, and declined to exercise jurisdiction over supplemental state law claims, dismissing them without prejudice. App., *infra*, 27a.

The Seventh Circuit for the Court of Appeals affirmed the District Court's decision, finding that a state-created-danger did not apply to state-created attractions outside of exceptional circumstances, and constricted state-created-danger claims to those with evidence of criminal intent targeting a selective class of individuals. App., *infra*, 7a-11a.

REASONS FOR GRANTING THE PETITION

The state created a dangerous, murky pond, with sudden, hidden drop-offs, invited small children to swim there and charged their parents for the privilege, then ignored their own rules that were in place to ensure the safety of small young children in the pond, and a child died. The state promised this swimming pond as a safer alternative, and this justified the expense of both tax

moneys used and private charges incurred. The pond was a danger to young children. The state created it. Yet, the Seventh Circuit says that can never be a state created danger?

The twin decisions that shape this area of law are *DeShaney* and *Sacramento*. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). As this court established in *DeShaney*, states are not responsible for someone's loss of life, liberty or property as long as they "played no part in their creation, nor did it do anything to render him any more vulnerable to them." *DeShaney*, 489 U.S., at 201. Just as *DeShaney* only imposed two elements for a state-created danger doctrine, coequally and concomitantly, this Court outlined a ranked structure of culpable intent for cases including state-created-danger cases that mirrored the correlation between intent and culpability in tort and criminal law alike. *County of Sacramento*, 523 U.S. at 833. Notably, neither an intent to harm nor conscious disregard of a known risk are required levels of intent for state created dangers that do not result from emergency-response individual issues where "hurried" decision making is not involved. Yet, the decision below required invidious criminal intent targeting a select class of individuals before a state created danger that takes a life could even be considered a due process violation.

In the published case below, the Seventh Circuit limited the state-created danger theory of due process liability to those cases where a plaintiff could prove specifically identified individuals acted with criminal intent. App., *infra*, 7a. Thus, even where a state created a danger that

caused the loss of life, the Seventh Circuit determined no liability could attach as a matter of law, unless the family of the dead child could prove a specific individual employed by the state criminally intended to see the child die. The decision below imposed additional elements on the state-created danger doctrine, contradicting the language of this court in *DeShaney*, and imposed the highest known intent standard for state-created-dangers, directly contradicting the plateaued structure of culpable intent set by this Court in *Sacramento*.

The Circuits remain widely and wildly split on this area of law, with some Circuits refusing to recognize a state created danger can ever violate the due process protections of individuals' life, liberty and property, while other Circuits conflict on what elements exist to the claim, and further conflict on what level of culpable intent is required, and conflict on whether certain conduct constitutes such level of culpable intent. This chaos of confusion creates a tornado across the legal landscape, to the detriment of citizens, states, and courts alike. Clarity calls for this court to grant certiorari to resolve.

I. The Law In This Area is Hopelessly Confused, with Circuits in Deep Conflict As To Whether A State-Created Danger is Even a Violation of Due Process

The Fourteenth Amendment's Due Process clause protects citizens from state harm, by guaranteeing "nor shall any state deprive any person of life, liberty or property without due process of law." U.S. Const. Amend. XIV, § 1. This protects a person's life, liberty and property from known or obvious state-created risks of harm the state fails to take reasonable steps to protect against. The

state deprived Swannie Her of her life when it invited her to a state-created, man-made swimming pond declared safe for her swimming, when in fact it was a death trap for little girls just like her. Is that due process of law?

The Circuits split, and this area of law is in chaos. Some courts doubt whether the state-created danger doctrine applies at all. Some courts doubt whether the state-created danger doctrine applies to actions that do not involve private violence by third parties. None agree on the legal standard governing state-created danger claims.

As some Circuits articulate it, consonant to this court's language in *Deshaney*, a state is liable for failing to protect an individual from harm when the state creates the danger. *Turner v. Thomas*, 930 F.3d 640 (4th Cir. 2019); *Spady v. Bethlehem Area School Dist.*, 800 F.3d 633 (3d Cir. 2015); *Bracken v. Okura*, 869 F.3d 771 (9th Cir. 2017). The D.C. Circuit found that "a key requirement for constitutional liability is affirmative conduct by the State to increase or create the danger that results in harm to the individual." *Butera v. District of Columbia*, 235 F.3d 637, 650 (D.C. Cir. 2001). "When the state itself creates the dangerous situation that resulted in a victim's injury, the absence of a custodial relationship may not be dispositive. In such instances, the state is not merely accused of a failure to act; it becomes much more akin to an actor itself directly causing harm to the injured party." *Pinder v. Johnson*, 54 F.2d 1169, 1177 (4th Cir. 1995). The "state created danger" finds "state actors may be liable for failing to protect injured parties from dangers which the state actors either created or enhanced." *Turner*, 930 F.3d, at 644. The Second Circuit defined it as "where the state actors actually contributed to the vulnerability

of the plaintiff" to a known danger. *Okin v. Village of Cornwall-On-Hudson Police Dept.*, 577 F.3d 415, 428 (2nd Cir. 2009). Indeed, "the state owes a duty to protect individuals if it created the danger to which the individuals are subjected." *Anderson as trustee for next-of-kin of Anderson v. City of Minneapolis*, 934 F.3d 876, 881 (8th Cir. 2019). This comports with fellow scholastic treatments of the issue. See Erwin Chemerinsky, The State-Created Danger Doctrine, 23 Touro L. Rev. 1 (2007). The doctrine puts force to the original promise of the Fourteenth Amendment and the original intent of the civil rights laws. See David Pruessner, The Forgotten Foundation of State-Created Danger Claims, 20 Rev. Litig. 357 (2001) (state-created-danger doctrine was precisely what the original civil rights laws were intended to protect against).

Depending on the Circuit, the elements of such a state-created-danger claim may be two, three, four, five or six. The Circuits widely and wildly digress. Fellow jurists note the confusion surrounding this area of law. As one justice notes, different courts "adopt different versions of a state-created danger theory of substantive due process." *Estate of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 493 (6th Cir. 2019) (Murphy, J., concurring). Fellow jurists describe the "guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Id*. The Seventh Circuit even doubted whether the lower court's decision here comported with Supreme Court precedent. *See Weiland v. Loomis*, 938 F.3d 917, 920 (7th Cir. 2019).

Three Circuits admit they imposed such high burdens on state-created danger claims that they literally have "never issued a published opinion recognizing a successful

state-created danger claim." *Turner v. Thomas*, 930 F.3d at 646; *see also Irish v. Maine*, 849 F.3d 521, 526 (1st Cir. 2017); *Rios v. City of Del Rio*, 444 F.3d 417, 422 (5th Cir. 2006). The First Circuit acknowledged the "possible existence of the state-created danger theory" but noted it had "never found it applicable to any specific set of facts." *Irish*, 849 F.3d at, 526. The Fifth Circuit raised doubts as whether any state-created danger even exists at all. *Rios*, 444 F.3d, at 422. Assuming a Circuit has acknowledged the existence of the claim and actually applied it to a set of facts, they cannot concur on the elements of the claim.

The First Circuit suggested that a state-created danger known to the state to risk a person's life that does, in fact, take a life would still be "due process" if the state's actions do not also "shock the conscience of the court." *Irish*, 849 F.3d, at 526.

The Third Circuit employed its own four-part test. *See Kneipp v. Tedder*, 95 F.3d 1199, 1207 (3d Cir. 1996). The Third Circuit's test focused on state use of its authority to create the harm, a standard not followed by many other Circuits. *Id*. The Third Circuit, in other cases, identified four elements to a state-created danger cause of action, though it included either/or clauses within its four elements that often make it sound like five or six elements. *See Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 717 (3d Cir. 2018).

The Sixth Circuit added a requirement that there be a "special danger" to a specific individual. *See Stiles ex. Rel. D.S. v. Grainger County, Tenn.*, 819 F.3d 834 (6th Cir. 2016). The Sixth Circuit's three-element test for state-created-danger causes of action added this "special

danger" requirement that "placed the plaintiff specifically at risk, as distinguished from a risk that affects the public," a test rooted in inapposite equal protection law, not due process law. *Estate of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 491-492 (6th Cir. 2019). Yet, the Seventh Circuit adopted it here in this case below.

The Tenth Circuit imposed a five-part test in one case, and then a six-part test in another case. *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995); *see also T.D. v. Patton*, 868 F.3d 1209, 1222 (10th Cir. 2017). The Tenth Circuit imposed a range of additional elements for state-created-danger claims: creating a danger that deprives an individual of their life, liberty or property without due process of law is not sufficient even when it is a known danger the state fails to remediate or protect the individual from. The Tenth Circuit requires the plaintiff be of a "limited and specifically definable group" (as the Seventh Circuit added here), that the danger be a "substantial risk" of a "serious, immediate and proximate harm," that defendants acted with the level of culpable intent this court limited to the "hurried decision" context, and that, even then, such conduct is not actionable or remediable unless the court subjectively concludes "such conduct, when viewed in total, is conscience shocking." *T.D. v. Patton*, 868 F.3d, at 1222. The Tenth Circuit, like the decision here, ignored this Court and other Circuits by determining that "permitting unreasonable risks" of a danger created by the state does not qualify as a due process violation even if it takes a life. *See T.D. v. Patton*, 868 F.3d, at 1222.

Districts within the Eleventh Circuit concluded the state-created danger cause of action no longer exists and was replaced by a vague "shock the conscience" cause

of action. *K.W. v. Lee County School Bd.*, 67 F.Supp.3d 1330, 1336 (M.D. Fla. 2014). "The state-created danger exception has since been replaced by the standard employed" for general "conscience shocking" conduct. *Id.* Under this interpretation, even state-created dangers that cause harm with deliberate indifference by state actors is not actionable unless the conduct is "more egregious than the deliberate indifference" standard. *Id.*, at 1339.

The Circuits have not articulated a consistent standard to state-created dangers that do not involve protecting citizens from private violence by non-state actors. Courts within the Fifth Circuit make a state less culpable for the dangers it creates than the actions of non-state actors and suggested state-created dangers never constitute a due process violation. *Residents Against Flooding v. Reinvestment Zone Number Seventeen, City of Houston, Texas*, 260 F.Supp.3d 738 (S.D. Tex. 2017).

This court only excused citizen dangers when the state "played no part in their creation, nor did it do anything to render [the citizen] any more vulnerable to [the danger]." *DeShaney*, 489 U.S. at, 201. This Court never said if a state created the danger itself and took affirmative acts that rendered a citizen more vulnerable to that danger, then the state is still completely immune as a matter of law unless the harmed citizen can prove a specifically identified state actor criminally intended the harm caused.

The state created danger doctrine parallels the same public policy theories of liability that undergird the invited nuisance doctrine, except for a higher level of culpability. It is like the neighbor who creates the invited nuisance for the neighbor's kids, but then solicits the kids to the invited

nuisance, promises the parents safety, and charges the kids money for the privilege. To make it analogous to the case here, it would be like building a sandlot advertised as safe for young kids, then filling parts of it with quicksand, and inviting the neighbors' children to partake at a price, then disclaiming responsibility for their death.

A key here is that a parent will not take her child to a man-made beach with murky water with a bad, impossible-to-see drop-off; by contrast, they will take their child to the state-created, state-promoted, state-protected fee-charging swimming pond the state promises is safe for their young children to swim in.

West Bend created a dangerous, murky pond, invited the public to swim there for a fee, posted lifeguards to give the illusory appearance of safety, and drafted mandatory policy/procedures to ensure the safety of its patrons with a special emphasis on small children – not a single one of which were followed by the young lifeguards in relation to Swannie Her's drowning death.

West Bend, besides creating the murky pond and facilitating the activity, further increased the danger by (1) filling the pond with muddy water with virtually no visibility and failing to take any action (such as dredging the water or placing a sand pond-bed) to alleviate the visibility hazard, (2) failing to follow mandatory policy/procedures, designed to ensure the safety of its patrons with a special emphasis on small children, in relation to Swannie Her's drowning death, (3) failing to call for additional lifeguard support when a lifeguard was overwhelmed and unable to scan her zone of coverage effectively, (4) providing an aura of safety by posting

lifeguards but failing to execute to most basic lifeguard duties such as observing Swannie Her a single time over the 40 minutes she was in and out of the water with her siblings or recognizing and removing Swannie (a small child outside arm's reach of an adult) from the water, (5) failing to post the Murky pond's rules in a centralized, conspicuous place or announce them to patrons, and (6) failing to address the hazard of a hidden depression or drop-off in an area open to small children who had not been swim-tested. App., *infra*, 3a,7a, 9a, 21a-24a, 31a. Injuries resulting from dangers created and increased by the state are precisely the sort of state-action deprivation that the state-created danger theory is meant to address.

If the state can skate in this case, then this incentivizes the state to create more dangerous amusements it promotes as safe and charges the public for without consequence for creating the inviting nuisance from hell. How is it the state can be responsible for putting a person near a dangerous person but is not responsible when it creates the danger itself, and refuses to follow any of its elemental rules to protect one of the most vulnerable populations from known risk of harm the state created?

II. The Circuits Conflict on the Relevant Level of Intent for State-Created Danger Claims, Often in Conflict with this Court's Precedents

The Circuits also cannot concur on what intent standard to apply. Some circuits require "deliberate indifference", but do not agree on what defines deliberate indifference in the state-created danger context. For example, several circuits apply deliberate indifference in the same language as this Court – when a state creates

a danger to an individual, and fails to take reasonable precautions against that danger, then that is deliberate indifference. Other circuits apply deliberate indifference as an additional element, but only as applied to the danger posed, not the individual harmed. The Seventh Circuit stands out in immunizing state created dangers that harm citizens unless the individual harmed can show invidious, criminal intent on behalf of the state to harm that individual directly.

The D.C. Circuit recognized the state-created danger doctrine as one that does not require a criminal level of intent to establish liability due to the state affirmatively taking on additional duties in cases of either created dangers or custodial control. *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001). The court noted that "something more than negligence but less than intentional conduct, such as recklessness of gross negligence" is called for in such cases. *Butera*, 235 F.3d, at 651 (*citing County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998). The Ninth Circuit generally mirrors this. *See Henry A. v. Willden*, 678 F.3d 991 (9th Cir., 2012). The Second Circuit similarly found a lesser level of culpable intent necessary where the state itself creates a foreseeable danger outside of an emergency-response circumstance. *Pena v. DePrisco*, 432 F.3d 98, 114 (2nd Cir. 2005). The state can be liable "even if they do not accuse the defendants of acting with specific intent or desire to cause physical injury" where the defendants "created a serious danger by acting with deliberate indifference to it." *Pena*, 432 F.3d at 114.

The Seventh Circuit added two other elements: "conduct so egregious and culpable that it shocks the

conscience" as a "necessary predicate" and additional element before a court can "find that injury from a state-created danger amounts to a due process violation." The Seventh Circuit in this case required proof of "criminal recklessness" by an identified individual and combined it with the Sixth Circuit's special danger to require proof of criminal intent to cause a special danger to this specific individual. App., *infra*, 7a-11a. The court required individual defendants "must act with a mens rea akin to criminal recklessness for constitutional liability to attach." *Id*. Essentially, the Seventh Circuit requires criminal prosecution of a civil case before liability can ever attach. That meets neither purpose nor legislative intent of s.1983.

This conflicts with sister circuits, that limit the application of deliberate indifference to the risk, and find state created dangers obvious or known to a state defendant that cause harm constitute conscience shocking behavior by itself. Deliberate indifference applies to the danger, for several Circuits. *See Henry A. v. Willden*, 678 F.3d 991 (9th Cir., 2012). The Third Circuit noted such a heightened "shocks the conscience standard is limited to police pursuit cases." *Kneipp*, 95 F.3d, at 1207.

The decision below also conflicts with *DeShaney*. Under *DeShaney*, the state knowingly creating a danger that causes harm constitutes a violation of due process. Creating a danger, knowingly disregarding that danger, and causing loss of life, is itself shocking to the conscience. There is no "shock the conscience" clause in the Fourteenth Amendment when it is the state itself that causes the loss of life by its own created danger.

Circuits call the "shock the conscience" test imposed by the lower court here a "troubling, subjective" test. *L.W. v. Grubbs II*, 92 F.3d 894, 897 (9th Cir. 1992). Fellow jurists note the problem with "some exacerbated mental element" in tests that so widely and wildly vary across "the relationship between mental states, possible harm, foreseeable risk, and actual harm" creating "inconsistent locutions" across the case law. *L.W. v. Grubbs II*, 92 F.3d, at 900 (9th Cir. 1992) (Fernandez, J., concurring).

This Court itself did not require "an intent to cause harm" as the relevant standard of intent unless it was equivalent to an emergency-response type circumstance. *County of Sacramento*, 523 U.S., at 847. Equally, this Court rejected the heightened standard of "conscious disregard of a great risk of serious harm" unless the circumstance required "hurried" action by the state. *Id.*, at 847, 853. Indeed, in cases like these, of state-created dangers that were neither the result of emergency responses nor hurried decisions, but long-time forethought with very foreseeable risk of this precise type (drowning of small children in a state-created swimming pond with murky water, undisclosed sharp cut-offs, and no enforcement of safety rules for small children), this court imposed a standard less than both intent to cause harm or conscious disregard of known risk. *Id.*, at 847-54. This court only required the standard be above that of simple negligence but below that of criminal recklessness. *Id.*, at 850-54.

Deliberate indifference can be established in the D.C. Circuit by awareness of the risk and inadequate steps to prevent it from causing harm, noting "the State also owes a duty of protection when its agents create or increase the danger to an individual." *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001). The D.C.

Circuit recognized the state-created danger doctrine as one that does not require a criminal level of intent to establish liability due to the state affirmatively taking on additional duties in cases of either created dangers or custodial control. *Id.* The court noted that "something more than negligence but less than intentional conduct, such as recklessness of gross negligence" is called for in such cases. *Id.* at 651 (*citing County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998).

The Eighth Circuit here disagrees with the decision below and concurs with sister Circuits. In cases of state created danger, where the danger is not the product of an unanticipated emergency reaction, "something less than unjustifiable intent to harm" is required, but merely "calculated indifference" suffices. *Radecki v. Barela*, 146 F.3d 1227, 1232 (10th Cir. 1998). The Ninth Circuit follows suit. Indifference to a known state created danger that causes foreseeable harm constitutes a due process violation. *L.W. v. Grubbs*, 974 F.2d 119, 123 (9th Cir. 1992).

The decision below conflicts with decisions of this court, conflicts with Circuit courts, and creates a gap of protection for ordinary Americans against state created dangers than take away the most vulnerable lives, even when the state knowingly creates those dangers and ignores every protective precaution for safeguarding the most vulnerable lives in their care.

III. This Court Can Provide Clarity in an Area of Law that Impacts Citizenry and States Nationwide

This Court should clarify this critical area of law for the benefit of all. Did a person lose their life, liberty or property? Critically, was the state a cause of the loss of

their life, liberty or property? If so, did they lose their life, liberty or property by due process of law? Are there sufficient facts that a jury could conclude so as to each aspect? If so, liability attaches.

This follows the plain language of the text of the Amendment, concurs with original intent of both the amendment and the civil rights law enforcing them, and gives meaningful guidelines with objective standards entrusted to a jury to determine. It also avoids the unmanageable subjective vagaries of "conscience-shocking" super-legislature duties upon courts, the directionless guidelines that make the lottery of panel selection or circuit venue the dictate of the outcome and provides practicable standards for state actors to follow without imposing general negligence tort liability. When a state creates a danger that causes loss of life, liberty or property, the jury determines liability if there is any evidence a jury could infer shows the danger was either obvious or known to the state.

If a legislature passed a law that limited liability to whenever an action would "shock the conscience," the court would rightly strike down the law as void for vagueness. Requiring that no claim can go forward unless that claim shocks the conscience of the particular court, without any definition thereof or limitation thereupon, invites the vagaries of subjective bias of the particular court involved. As an example here, a court found that a dead kid didn't shock the conscience.

The decision below also created a red herring: that allowing this case to go to the jury (who really should be the ones to determine if something shocks the conscience

or not) somehow makes every accident at every state facility a violation of due process. That is nonsense. The danger here wasn't a nature created lake or ocean, river or stream, nor was it a concrete pool with four delineated corners and crystal clear waters; rather, the danger here was a man-made dangerous murky pond, with sudden drop-offs, inadequate lifeguards, and refusal to follow elemental safety protocols, while promising and inviting the public to attend, and charging them for the privilege. Though, it should be noted, that if a private pool company made a swimming pond for kids, invited them in, promised safety for parents, and charged them for it, then created a murky pond, with undisclosed sharp drop offs just a few feet into the kids' side of the pool, and refused to follow any of its own safety rules or protocols for young kids, and a five year old girl died because of it, the swimming pond owner likely would be in jail in Wisconsin.

While several Circuits expressly find that violation of established procedures constitute conscience shocking behavior, the court below rejected that. *See Irish*, 849 F.3d at, 527. Sister circuits found liability for third party violence where the state did far less than they did here to create the danger. *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (leaving drunk in high-crime area); *L.W. v. Grubbs*, 974 F.2d 119, 123 (9th Cir. 1992) (left state nurse alone with known sex-offender); *Penilla v. City of Huntington Park*, 115 F.2d 707 (9th Cir., 1997) (cancelling call to paramedics); *Munger v. City of Glasgow*, 227 F.3d 1082 (9th Cir. 2000) (ejecting drunk bar patron on a cold night).

State-created dangers should not be immune from liability because the state, itself, rather than a third

party, causes the harm. The Fourteenth Amendment' Due Process clause existed to protect citizens from all the creative ways a wayward state government can cause harm, not to excuse and exculpate state conduct that endanger the lives of the most vulnerable amongst us.

CONCLUSION

The state created a man-made pond to swim in, invited the public to the pond, charged the public for the privilege of swimming in the pond it publicly promoted as safe for children, and then created dangerous conditions for those very children and abandoned every one of their own safeguards for children, resulting in a young child's death. That is not the loss of life by due process of law. Let a jury decide the remedy. Grant cert.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED OCTOBER 18, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-3524

THE ESTATE OF SWANNIE HER, *et al.*,

Plaintiffs-Appellants,

v.

CRAIG HOEPPNER, PARKS DIRECTOR FOR THE CITY OF WEST BEND, *et al.*,

Defendants-Appellees.

May 29, 2019, Argued
September 26, 2019, Decided

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 17-CV-1015 — **Nancy Joseph**, *Magistrate Judge.*

Before KANNE, SYKES, and BRENNAN, *Circuit Judges.*

SYKES, *Circuit Judge.* A June afternoon in Wisconsin took a tragic turn when six-year-old Swannie Her was found unresponsive on the bottom of a man-made swimming pond operated by the City of West Bend. She never regained consciousness and died a few days later.

Appendix A

Swannie's estate, her mother, and her siblings filed suit alleging that she died as a result of federal constitutional and state-law violations by the West Bend Parks Director, the seven lifeguards who were on duty, and the City. The constitutional claim arises under 42 U.S.C. § 1983 and alleges a deprivation of life without due process in violation of rights secured by the Fourteenth Amendment. The theory of the claim rests on two contentions: (1) the City's swimming pond is a state-created danger and (2) the defendants acted or failed to act in a way that increased the danger. A magistrate judge entered summary judgment for the defendants, ruling that the evidence is insufficient to permit a reasonable jury to find a due-process violation premised on a state-created danger. The judge relinquished jurisdiction over the state-law claims, setting up this appeal.

We affirm. Liability for injury from a state-created danger is an exception to the general rule that the Due Process Clause confers no affirmative right to governmental aid. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). Our caselaw construes this exception narrowly, and the judge correctly concluded that this case falls outside its boundaries. No reasonable jury could find that the defendants created a danger just by operating a public swimming pond or that they did anything to increase the danger to Swannie before she drowned. Nor was their conduct so egregious and culpable that it "shocks the conscience," a necessary predicate for a court to find that an injury from a state-created danger amounts to a due-process violation.

Appendix A

I. Background

The City of West Bend owns and operates Regner Park, a large public area with several recreational options. During the summer months, patrons can cool off in the park's manmade swimming pond for a small fee. Like other bodies of water with organic floors, the Regner Park pond is murky. Visibility is limited to roughly six inches below the surface, and swimmers more than two feet from shore cannot see the bottom.

The pond is divided into three zones: Zone 1, the general swimming area, ranges in depth up to a maximum of five feet. Zone 2, which features a diving raft, is the center of the pond and reaches a depth of fifteen feet. And Zone 3, the children's play area, is no more than three-feet deep. Ropes and buoys cordon off the three zones; they also mark points where the water gets deeper. Swimmers wishing to enter Zone 2—or otherwise enter water deeper than their armpits—must pass a swim test, at which point they receive a special wristband signifying that they are permitted to do so.

Lifeguards employed by the City patrol the pond. Each lifeguard is certified in basic lifeguarding practices and receives pond-specific instruction. They also receive the West Bend Aquatic Manual & Emergency Response Plan, a guidebook to preventing accidents at the pond. Most importantly, the manual urges lifeguards to keep close watch on inexperienced swimmers and small children. The parties debate whether those surveillance responsibilities are "mandatory," as the plaintiffs characterize them, or

if lifeguards "[a]re allowed to use their judgment and discretion when scanning the water to determine where to focus their attention," as the defendants maintain.

On June 11, 2016, the Her family—mother Connie, her fiancé, and nine of her ten children—gathered in Regner Park to celebrate a relative's second birthday. The party took place at a picnic area near the swimming pond. Young Swannie arrived at roughly 5 p.m. that afternoon with two of her siblings. After greeting family and friends, she donned her bathing suit and obtained her mother's permission to swim in the pond. Connie did not accompany Swannie but rather asked two of her older children—Evangelin, age 9, and Thvon, age 14—to keep an eye on their younger sister. Swannie received a general admission wristband, but she never took the swim test required to swim in water above her armpits.

The Her children began swimming in Zone 3. At some point Swannie said she wanted to go see Ekin, another sibling, in a deeper part of the pond. No one knows precisely when or where Swannie went beneath the surface; neither the seven lifeguards on duty nor any member of the Her family or anyone else at the pond witnessed it. But at 5:55 p.m. a man swimming in Zone 2 discovered Swannie unresponsive at the bottom of the pond. He carried her out of the water and called for help. The lifeguards immediately called 911 and began resuscitation efforts. Emergency medical responders took Swannie to a nearby hospital, but she never regained consciousness and died several days later.

Swannie's estate, together with Connie and her surviving children (collectively "the Estate"), filed this lawsuit the following year. The defendants are Parks Director Craig Hoeppner, the City and its insurer, and the seven lifeguards who were on duty that day. The complaint seeks damages under § 1983 for violation of Swannie's Fourteenth Amendment right to due process. The claim rests on the doctrine of "state-created danger": the Estate claims that the defendants created and operated a dangerously murky pond and failed to follow established lifeguarding rules, increasing the danger to Swannie. The suit also raised state-law claims for negligence, wrongful death, and a violation of Wisconsin's Safe Place Statute.

The defendants moved for summary judgment, and the magistrate judge granted the motion, concluding that the Estate lacks evidence that the defendants created a danger by operating the swimming pond or increased a danger by their conduct on the day she drowned. The judge explained that any factual disputes about the adequacy of the pond's safety protocols raised at most a potential question of negligence, not a violation of due process. The judge relinquished supplemental jurisdiction over the state-law claims and entered final judgment for the defendants.

II. Discussion

We review a summary judgment de novo, construing the record and drawing all reasonable inferences in the plaintiffs' favor as the nonmoving parties. *Wilson-Trattner v. Campbell*, 863 F.3d 589, 593 (7th Cir. 2017).

Summary judgment is warranted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). We review the magistrate judge's decision to relinquish supplemental jurisdiction for an abuse of discretion. *Rivera v. Allstate Ins. Co.*, 913 F.3d 603, 618 (7th Cir. 2018).

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, § 1. The Supreme Court has cautioned that the Due Process Clause "does not transform every tort committed by a state actor into a constitutional violation." *DeShaney*, 489 U.S. at 202. More specifically, the Clause "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." *Id.* at 196.

There are two recognized exceptions to the *DeShaney* rule. First, when a public official "affirmatively places a particular individual in a position of danger the individual would not otherwise have faced," the official may be liable for a due-process violation if injury results. *Monfils v. Taylor*, 165 F.3d 511, 516 (7th Cir. 1998) (quotation marks omitted). The second exception comes into play when "the state has a 'special relationship' with a person, that is, if the state has custody of a person, thus cutting off alternative avenues of aid." *Id.*

The exception for state-created dangers is at issue here, but it's quite narrow and reserved for "egregious" conduct by public officials. *Doe v. Village of Arlington*

Heights, 782 F.3d 911, 917 (7th Cir. 2015). A due-process claim of this kind requires proof of three elements: (1) the government, by its affirmative acts, created or increased a danger to the plaintiff; (2) the government's failure to protect against the danger caused the plaintiff's injury; and (3) the conduct in question "shocks the conscience." *Flint v. City of Belvidere*, 791 F.3d 764, 770 (7th Cir. 2015) (quotation marks omitted). The third element—conscience-shocking conduct—requires a culpable state of mind equivalent to deliberate indifference. *King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 819 (7th Cir. 2007). Elsewhere we've referred to this as a requirement of criminal recklessness. *See Slade v. Bd. of Sch. Dirs. of Milwaukee*, 702 F.3d 1027, 1033 (7th Cir. 2012).

Viewing the evidence in the light most favorable to the Estate, we agree with the magistrate judge that the record falls far short on each of these elements. The Estate emphasizes that the swimming pond was "murky" and had poor visibility and "uneven topography." That's true of manmade swimming holes in general, and many natural lakes as well. There's no evidence that the Regner Park swimming pond is distinctively dangerous.

The Estate also points to testimony from the defense expert describing swimming as an "inherently dangerous activity." That's certainly true. As even experienced swimmers will concede, any body of water—whether man-made or natural—presents inherent dangers, especially to children. *See id.* at 1032 (observing that most adults understand that "lakes and other natural bodies of water, even inland water, are dangerous because of currents and uneven depth, and especially to children"). Swimming, or participating in any water-based recreational activity

for that matter, exposes participants to risk of injury, including drowning.

And while operating any public swimming facility invites swimmers to expose themselves to the dangers inherent in this activity, liability under the Due Process Clause doesn't attach "just because the danger materializes." *Id.* at 1031. After all, "[d]angers to the public at large are insufficient for constitutional purposes." *See Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 828 (7th Cir. 2009). The Estate needs specific evidence that *this particular* swimming pond is especially dangerous for a young child like Swannie. It has none.

In the end, the Estate's argument boils down to the remarkable assertion that a municipal swimming pond is by its nature a state-created danger. That proposition, if adopted, would turn every tort injury at a public pond or pool into a constitutional violation. Federal constitutional claims involving public playgrounds and practice fields wouldn't be far behind. Indeed, the Estate's preferred result "would potentially set up a federal question whenever an accident happens during activities sponsored by the state." *Waybright v. Frederick County*, 528 F.3d 199, 208 (4th Cir. 2008). But the Fourteenth Amendment doesn't displace state tort law by transforming accidents at public facilities into federal constitutional claims. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 332, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) ("Our Constitution ... does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.").

Perhaps aware that its broad position is untenable, the Estate falls back on a narrower argument that the defendants *increased* a danger to Swannie. But this theory is no stronger because there's no evidence that the defendants actively "did something that turned a potential danger into an actual one." *Sandage v. Bd. of Comm'rs of Vanderburgh Cty.*, 548 F.3d 595, 600 (7th Cir. 2008). The Estate argues that the City failed to take proper safety precautions, like dredging the bottom of the pond, and the lifeguards failed to comply with the park's "mandatory" rules involving small children. And it emphasizes evidence that the pond was especially crowded on the afternoon in question, and at one point a lifeguard admitting to being "overwhelmed" by the number of swimmers.

But we've explained that *DeShaney* draws an "essential distinction between *endangering* and *failing to protect*." *Id.* at 599 (emphases added). The former may amount to a constitutional violation if other facts are present; the latter is simple negligence. Moreover, no evidence suggests that the lifeguards disregarded their training. Each lifeguard was charged with scanning the swimming pond for signs of trouble and responding as needed. That Swannie slipped beneath the surface without being noticed by *anyone*—lifeguard, family member, or anybody else at the pond—reflects the heartbreaking reality of childhood drownings. But it's not evidence that the defendants took affirmative steps that created or increased a danger to Swannie.

The Estate's difficulty articulating a theory of the case that might situate this claim within the law of state-created dangers reflects the fundamental problem with its position: this is at most a negligence claim. To be sure,

"[n]ot paying enough attention to a child and thus allowing the child to ... drown is terribly tragic, and possibly even negligent." *DeAnzona v. City & County of Denver*, 222 F.3d 1229, 1236 (10th Cir. 2000). But mere negligence is "categorically beneath the threshold of constitutional due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 849, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). Indeed, "governmental defendants must act with a *mens rea* akin to criminal recklessness for constitutional liability to attach." *Flint*, 791 F.3d at 770.

We made this point clear in *Slade*, another drowning case brought on a theory of state-created danger. There, a middle-school student drowned on a field trip to a park with a large natural lake. 702 F.3d at 1028-29. Swimming was anticipated; indeed, parents were asked to indicate when signing the permission slip whether their student was allowed to swim. The school district had a rule prohibiting swimming on field trips unless a lifeguard is present. No lifeguard was present that day, but the assistant principal let the students swim anyway and a seventh-grade boy drowned. We noted that the assistant principal "was negligent and her negligence enhanced the danger inherent in swimming in a lake: she disobeyed the rule requiring the presence of a lifeguard even though she knew that portions of the designated swimming area were so deep that the water was over the head of some of the kids." *Id.* at 1032. While that negligence may have increased the risk of danger to the student, it was not the type of reckless, conscience-shocking conduct that might be actionable as a constitutional violation. *Id.* at 1032-33.

Slade involved far more blameworthy conduct than what occurred here, and still we rejected the due-process

claim. Despite the tragic loss of life, *Slade* hewed closely to the principle that the Due Process Clause cannot be interpreted "to impose federal duties that are analogous to those traditionally imposed by state tort law." *Collins v. City of Harker Heights*, 503 U.S. 115, 128, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). We do the same here. On this record, no reasonable jury could find that the defendants created or increased a danger to Swannie or that they were deliberately indifferent to the danger. The judge was right to enter summary judgment for the defendants.

AFFIRMED

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, FILED OCTOBER 30, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 17-CV-1015

ESTATE OF SWANNIE HER, *et al.*,

Plaintiffs,

v.

KRAIG SADOWNIKOW, *et al.*,

Defendants.

October 30, 2018, Decided
October 30, 2018, Filed

DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This action arises from the tragic drowning death of six-year-old Swannie Her on June 11, 2016 at the City of West Bend's Regner Park. The plaintiffs are the estate of Swannie Her, her parents, and her nine siblings (collectively "the plaintiffs"). The defendants are the City of West Bend ("the City"), the City's insurer, Parks and Recreation Director Craig Hoeppner, and the lifeguards working the day of the incident (collectively

"the defendants"). The plaintiffs allege federal and state law causes of action against the defendants, including a "Fourteenth Amendment Deprivation," negligence, violation of Wisconsin's Safe Place Statute, and wrongful death. (Amended Complaint, Docket # 17.) The defendants have moved for summary judgment arguing that the plaintiffs cannot show a constitutional violation under the Fourteenth Amendment. For the reasons explained below, the defendants' motion for summary judgment is granted.

UNDISPUTED FACTS

The City of West Bend's Regner Park pond is a man-made pond that holds natural water that is pumped from the spring into the pond from two wells. (Pls.' Proposed Findings of Fact ("PPFOF") ¶ 1, Docket # 60 and Defs.' Response to PPFOF ("Defs.' Resp.") ¶ 1, Docket # 64.) The pond is always murky with a muck/mud bottom. The bottom of the pond cannot be seen more than two feet in from the shore and visibility beneath the surface is less than six inches; lifeguards could not see more than a foot in front of their faces while swimming. (*Id.* ¶ 2.) The pond is divided into a children's play area, a diving raft area, and a general area; for lifeguarding responsibilities, the general area is Zone 1; the diving raft area is Zone 2; and the children's play area is Zone 3. (*Id.* ¶ 3.) Small children would generally stay on the east side of the pond in the part known as Zone 3, which is marked by a rope and buoys. (*Id.* ¶ 4.) On the north and south sides of Zone 2, there are sandy beaches. There is a gradual slope in the pond to the deep water, and a rope with buoys where the water gets deeper; the ropes are where the water is

approximately eight feet deep on the north side of the pond and approximately six feet deep on the south side of the pond. (*Id.* ¶ 5.)

On June 11, 2016, Connie Her went to Regner Park to attend her two-year-old nephew's birthday party. (Defs.' Proposed Findings of Fact ("DPFOF") ¶ 2, Docket # 38 and Pl.'s Resp. to DPFOF ("Pls.' Resp.") ¶ 2, Docket # 61.) The birthday party took place at a picnic area near the sand/grassy area adjacent to the pond. (*Id.* ¶ 3.) Connie Her initially brought six of her ten children and her boyfriend/fiancé to the pond. (*Id.* ¶¶ 4-5.)

At approximately 3:00 p.m., Connie Her, her boyfriend/fiancé, and two of her children left Regner Park to go pick up her three other children, including six-year-old Swannie Her. (*Id.* ¶ 6.) At that time, those three children lived with their father, Chong Her. (*Id.*) Connie Her informed Chong Her that "the kids were going to the birthday party" and that "there was a swimming pond at the park that [they] were going to go to." (*Id.* ¶ 8.)

After picking up the children, Connie Her, her boyfriend/fiancé, and the five children drove back to Regner Park and arrived at approximately 5:00 p.m. (*Id.* ¶ 9.) After they arrived back at Regner Park, they went to the area where the birthday party was organized to greet family and friends. (*Id.* ¶ 12.) Shortly after greeting family and friends, Swannie put her swimsuit on and obtained Connie Her's permission to go in the pond with her siblings. (*Id.* ¶ 13.) Connie Her did not accompany Swannie to the pond. (*Id.* ¶ 14.) At some point, Swannie

told her siblings that she wanted to go swim and play with her other sibling who was in the deeper area of the pond. (*Id.* ¶ 37.) The parties dispute when Swannie went beneath the surface of the water; however, the parties agree that Swannie was found unresponsive at approximately 5:50 p.m. at the bottom of the pond by an adult male patron in water up to his chest, and a lifeguard saw the patron carrying Swannie toward the south side of Zone Two after she heard him yelling for help. (PPFOF ¶¶ 62, 67 and Defs.› Resp. ¶¶ 62, 67.) After Swannie was pulled from the pond, she did not regain a pulse, start breathing, or regain consciousness. (*Id.* ¶ 65.)

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "Material facts" are those under the applicable substantive law that "might affect the outcome of the suit." *See Anderson*, 477 U.S. at 248. The mere existence of some factual dispute does not defeat a summary judgment motion. A dispute over a "material fact" is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

In evaluating a motion for summary judgment, the court must draw all inferences in a light most favorable to

the nonmovant. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). However, when the nonmovant is the party with the ultimate burden of proof at trial, that party retains its burden of producing evidence which would support a reasonable jury verdict. *Celotex Corp.*, 477 U.S. at 324. Evidence relied upon must be of a type that would be admissible at trial. *See Gunville v. Walker*, 583 F.3d 979, 985 (7th Cir. 2009). To survive summary judgment, a party cannot rely on his pleadings and "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248. "In short, 'summary judgment is appropriate if, on the record as a whole, a rational trier of fact could not find for the non-moving party.'" *Durkin v. Equifax Check Services, Inc.*, 406 F.3d 410, 414 (7th Cir. 2005) (citing *Turner v. J.V.D.B. & Assocs., Inc.*, 330 F.3d 991, 994 (7th Cir. 2003)).

ANALYSIS

The defendants move for summary judgment arguing that the plaintiffs cannot show a constitutional violation under the Fourteenth Amendment and thus the plaintiffs' federal claim should be dismissed. Without the federal claim, the defendants argue I should decline exercising supplemental jurisdiction over the plaintiffs' remaining state law claims. The plaintiffs argue that they do show a constitutional violation under the state-created danger exception to the Due Process Clause. (Pls.' Br. at 5-15, Docket # 59.)

Appendix B

1. Applicable Law: State-Created Danger Exception

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." The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). In *DeShaney*, the Supreme Court found that "the Due Process Clause[] 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." *Id.* at 196. There are, however, two exceptions to *DeShaney*'s general rule. First, when the state has a "special relationship" with the person such as "when it has custody over a person, it must protect him because no alternate avenues of aid exist." Second, under the state-created danger exception, "liability exists when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." *Doe v. Vill. of Arlington Heights*, 782 F.3d 911, 916 (7th Cir. 2015) (internal citation and quotation omitted).

To recover under the state-created danger exception, a plaintiff must demonstrate that: (1) the state, by its affirmative acts, created or increased a danger faced by an individual; (2) the failure on the part of the state to protect an individual from such a danger is the proximate cause of the injury to the individual; and (3) the state's failure to protect the individual must shock the conscience. *King ex*

rel. King v. E. St. Louis Sch. Dist. 189, 496 F.3d 812, 817-18 (7th Cir. 2007). "The state-created danger exception is a narrow one." *Doe*, 782 F.3d at 917. The Seventh Circuit explained that the state-created danger exception "must not be interpreted so broadly as to erase the essential distinction between endangering and failing to protect and thus circumvent *DeShaney*'s general rule. When courts speak of the state's 'increasing' the danger of private violence, they mean the state did something that turned a potential danger into an actual one, rather than that it just stood by and did nothing to prevent private violence." *Id.* (internal quotation and citation omitted). Thus, the cases in which the Seventh Circuit has either found or suggested that liability attaches under the state-created danger exception are "rare and often egregious." *Id.*

Several cases illustrate both the narrowness of the exception and the egregiousness of the state conduct contemplated by the exception. In *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998), Monfils had tipped off the police to a thief at his workplace in a phone call that the police recorded. He repeatedly begged the police not to release the tape to anyone because the thief was a violent person who would recognize his voice. He was assured it would not be released. The thief, however, requested a copy of the tape from the police, and a policeman who did not know about Monfils' fears gave it to him. The thief discovered that Monfils was the informant and killed him. *Id.* at 513-15. The court upheld a jury verdict for the plaintiff because Monfils was safe (or at least much safer) before the police released the tape, without which the thief would have been unlikely to identify the informant. By the act

of releasing the tape, the police created the danger to Monfils. *Id.* at 518.

In *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993), a drunk driver crossed the center line of the highway and crashed into the Reeds' car. *Id.* at 1123. Earlier that day, the defendant police officers had arrested the driver of the vehicle, leaving a drunk passenger behind. *Id.* The passenger became the drunk driver who caused the head-on collision approximately two hours later. *Id.* The court found that, although it was hesitant to find § 1983 liability outside the custodial setting, "plaintiffs such as the Reeds may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger that they otherwise would have been." *Id.* at 1126. The court found that by "removing a safe driver from the road and not taking steps to prevent a dangerous driver from taking the wheel, the defendants arguably changed a safe situation into a dangerous one." *Id.* at 1127.

In *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990), a twelve-year-old boy drown in Lake Michigan during the Waukegan Lakefront Festival. *Id.* at 1424. After the boy fell into the water, his friends ran for help. Two lifeguards, two firefighters, and a police officer responded, as well as two scuba-diving civilians with a boat. Before any rescue attempt could begin, however, the Lake County Deputy Sheriff arrived in a marine patrol boat. The city of Waukegan and Lake County had previously entered into an intergovernmental agreement that required

the county to provide all police services in the entities' concurrent jurisdiction on Lake Michigan. Under its authority to police the lake, the county and its sheriff had promulgated a policy that directed all members of the sheriff's department to prevent any civilian from attempting to rescue a person in danger of drowning in the lake. This policy contemplated that only divers from the city of Waukegan Fire Department could carry out such a rescue. With this policy in mind, the Deputy Sheriff ordered all the persons then on the scene to cease their rescue efforts. When the civilian scuba divers stated that they would attempt the rescue at their own risk, the Deputy Sheriff responded that he would arrest them upon their entry into the water and even positioned his boat to prevent their dive. A Waukegan police officer agreed that the Deputy Sheriff had authority over the scene and advised his fellow city employees that they should heed the Deputy Sheriff's instructions. *Id.* at 1424-25. The court found that the county's policy of cutting off private aid to drowning victims led to the deprivation of the child's constitutionally protected right to life. *Id.* at 1431.

Two over-arching themes are apparent in these cases and similar cases falling under this exception. First, the cases involve the state either placing a person in a situation in which he is endangered by other private actors or the state escalates a person's situation from potential danger to actual danger. Second, the state's conduct which places the person in danger or escalates the person's danger is egregious, as to "shock the conscience."

2. Application to This Case

In this case, the plaintiffs argue that the state-created exception applies because the City of West Bend both created and increased the danger to Swannie. The plaintiffs argue that the Regner Park pond was a man-made pond and that the City created the danger by creating a murky pond with almost zero visibility below the water's surface and unseeable topography across the bottom. (Pls.' Br. at 6.)

Even drawing all reasonable inferences in the light most favorable to the plaintiffs, as I must, the evidence is insufficient for a jury to conclude that the defendants created the danger to Swannie. It is true that the Regner Park pond is a man-made body of water with poor visibility and uneven topography, run by the City of West Bend. Moreover, no one disputes that swimming, whether in a swimming pool, man-made pond, or in a naturally occurring body of water, has inherent risks involved, including the risk of drowning. *See Slade v. Bd. of Sch. Directors of City of Milwaukee*, 702 F.3d 1027, 1032 (7th Cir. 2012) ("It is well known to most adults that lakes and other natural bodies of water, even inland water, are dangerous because of currents and uneven depth, and especially to children."). But the mere fact that the state built a swimming facility, whether a pool or a man-made pond, does not automatically create constitutional liability. Otherwise, every case involving an injury that occurred in a state-created swimming facility could automatically be brought in federal court. *See Slade v. Bd. of Sch. Directors of the City of Milwaukee*, 871 F. Supp. 2d 829, 833 (E.D.

Wis. 2012), *aff'd sub nom. Slade*, 702 F.3d 1027 (quoting *Waybright v. Frederick Cnty., Maryland*, 528 F.3d 199, 208 (4th Cir. 2008) ("The state-created danger theory is not so broad that it mandates a 'federal displacement of state authority over state activities'; otherwise, it would 'potentially set up a federal question whenever an accident happens during activities sponsored by the state.'").

The evidence is also insufficient to show that the defendants increased the danger to Swannie. The plaintiffs argue the defendants increased the danger to Swannie by failing to take proper safety precautions, such as failing to dredge the muck from the bottom of the pond, leaving the bottom of the pond uneven with unexpected drop-offs in an area open to small children, encouraging small children to enter the pond in a designated area that allowed access to a dangerous "deep well," not separating the children's area from the deeper areas, not putting buoys in areas that marked off depth changes, not creating a formal entrance where persons were informed of the safety rules, and not properly training the lifeguards. (Pls.' Br. at 9.) The plaintiffs further argue that the lifeguards increased the danger to Swannie because the lifeguards were responsible for announcing pool rules, yet Swannie's mother was never advised of the rules and the very fact that lifeguards were posted at the pond provided "an aura of safety to small children entering the Murky pond and gave Swannie's mother the false impression that the lifeguards would be watching out for Swannie while in the Murky pond." (Pls.' Br. at 10.) The plaintiffs are also critical of the training given to the lifeguards and the fact that one lifeguard, Abigail Ehmke, testified that she

felt "overwhelmed" that day and could not scan her zone properly. (Pls.' Br. at 11-14.)

The plaintiffs argue that Swannie's case is closely akin to the situation in *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). In *White*, three minor children were riding in an automobile driven by the children's uncle. *Id.* at 382. The uncle was stopped and arrested by police for drag racing. *Id.* Despite the uncle's pleading with the officers to take the children to the police station or to a phone booth so that they could contact their parents, the officers refused to provide any such aid. *Id.* Rather, the officers left the children in an abandoned automobile on the side of the road. *Id.* Under exposure of cold, the children finally realized that they had no alternative but to leave the car, cross eight lanes of traffic, and wander on the freeway at night in search of a telephone. *Id.* The plaintiffs argue that as in *White*, the defendants left Swannie to "navigate the Murky pond in a potentially life-threatening situation that lifeguards were specifically trained to identify and prevent." (Pls.' Br. at 9.)

White, however, is not helpful to the plaintiffs' case. In *White*, the court noted that "the police could not avoid knowing that, absent their assistance, the three children would be subjected to exposure to cold weather and danger from traffic." 592 F.2d at 385. The concurring opinion further explained that the children were under the protection of their uncle. *Id.* at 387. Arresting the uncle and providing the children no alternative protection left them exposed to the danger of the high-speed expressway and the cold. *Id.* In this case, Swannie went to the pond

in the custody and care of her mother. At no time did the defendants arrest Swannie's mother or any other state actor interfere with her mother's custody. Although the plaintiffs argue that having lifeguards gave Connie Her a false sense of security that the lifeguards would be watching Swannie, at no time was Swannie in the lifeguards' custody. So unlike in *White*, the defendants never took away Swannie's protector, leaving her to navigate the murky pond.

This case is more like *Slade*. In *Slade*, a seventh-grade student drown while on a school field trip to Mauthe Lake. The plaintiff argued that the defendants were liable based on the state-created danger exception. The plaintiff argued the defendants placed the student in danger by planning and facilitating a trip that allowed swimming in Mauthe Lake. 871 F. Supp. 2d at 832. In dismissing the plaintiff's claims, the court reasoned that the defendants did not require the student to swim and the student could have stayed out of the water without any adverse consequences. *Id.* In other words, the state did not force the student into the water or propel him into danger. *Id.* Similarly, the defendants did not force Swannie into the water. She could have stayed out of the water without adverse consequences.

As the Seventh Circuit stated in *Doe*, the state-created danger exception is narrow, reserved for those rare and egregious cases. 782 F.3d at 917. The plaintiffs argue they need not show the defendants' actions "shock the conscience" at summary judgment, citing the Seventh Circuit's pattern jury instruction 7.21 in support. (Pls.' Br.

at 11.) But the comments to pattern jury instruction 7.21 do not state that a plaintiff need not show the defendant's actions "shocks the conscience"; rather, it affirms this requirement. *See* 7.21f ("A state-created-danger claim is a 'substantive' due process claim, and as a result the cases say the plaintiff must establish that the defendant's action 'shocks the conscience.'"). While the Seventh Circuit in *Slade* expressed displeasure with the term "shocks the conscience" as a touchstone of liability because of its tendency to "complexify" the issue, 702 F.3d at 1033, the court did not do away with the element. *See McGinnis v. Muncie Cmty. Sch. Corp.*, No. 11-CV-1125, 2013 U.S. Dist. LEXIS 79548, 2013 WL 2456067, at *8 (S.D. Ind. June 5, 2013) (explaining that while Judge Posner in *Slade* expressed the court's unhappiness with the use of the terms "affirmative act" and "shocks the conscience" because of the difficulties defining the terms, the court "implicitly recognizes that the 'shocks the conscience' test is just a complicated term for the test he articulates"). Although this is clearly a tragic case, plaintiffs have not shown conduct on the part of the state that is so "clearly deserving of universal reprobation" that it "shocks the conscience." *White*, 592 F.2d at 385-86.

Finally, it is important to note that neither negligence nor gross negligence is sufficient for liability under the Due Process Clause. *See Salazar v. City of Chicago*, 940 F.2d 233, 238 (7th Cir. 1991). The plaintiffs do not allege that the City had absolutely no safety measures in place at the pond. There were lifeguards, there were guidelines in place for the lifeguards to follow to ensure patron safety, and the pond was divided into zones with roping to mark

the deeper areas. What the plaintiffs argue is that the defendants could have had more safety features in place to make the Regner Park pond a safer swimming facility. Whether the defendants failed to have sufficient safety measures in place is a question of whether the defendants failed to exercise ordinary care under the circumstances. This is a question of negligence, not a due process violation.

For these reasons, the defendants' motion for summary judgment is granted as to the plaintiffs' Fourteenth Amendment claim as to the individual defendants and the claim is dismissed. Because there is no underlying constitutional injury, all claims alleged under *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) are also dismissed. *See Thompson v. Boggs*, 33 F.3d 847, 859 (7th Cir. 1994) ("[T]o prevail on a *Monell* claim, the plaintiff must establish . . . that he suffered a constitutional injury.").

Without the Fourteenth Amendment claim, all that remains are the plaintiffs' state law claims. I will follow the general rule by relinquishing jurisdiction over the supplemental state law claims. *See Redwood v. Dobson*, 476 F.3d 462, 467 (7th Cir. 2007) ("A court that resolves all federal claims before trial normally should dismiss supplemental claims without prejudice."). Thus, the plaintiffs' state law claims are dismissed without prejudice.

CONCLUSION

This case is indisputably tragic, and nothing in this decision is intended to minimize the tragedy of the loss

of six-year-old Swannie. The Seventh Circuit has found, however, that the state-created danger exception is a narrow one, generally reserved for rare and egregious cases. Even drawing all reasonable inferences in the light most favorable to the plaintiffs, the evidence is insufficient for a jury to conclude that the defendants placed Swannie in danger or transformed her potential danger to actual danger. Thus, the defendants' motion for summary judgment as to the plaintiffs' Fourteenth Amendment claim is granted. I decline to exercise supplemental jurisdiction over the plaintiffs' pendent state law claims.

ORDER

NOW, THEREFORE, IT IS ORDERED that the defendants' motion for summary judgment (Docket # 36) is **GRANTED**. The plaintiffs' Fourteenth Amendment claim (First Cause of Action of Amended Complaint) is dismissed. Plaintiffs' state law claims (Second, Third, and Fourth Causes of Action of Amended Complaint) are dismissed without prejudice.

IT IS FURTHER ORDERED that the defendants' motion to exclude expert testimony (Docket # 42) is **MOOT**.

IT IS FURTHER ORDERED that the clerk of court will enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 30th day of October, 2018.

Appendix B

BY THE COURT:

/s/ Nancy Joseph
NANCY JOSEPH
United States Magistrate Judge