No. 07-1289

United States Court of Appeals
for the
Fourth Circuit

JAMES WAYBRIGHT, as personal representative and co-executor of the estate of Andrew Waybright (deceased); and SHIRLEY WAYBRIGHT, individually and as personal representative and co-executor of the estate of Andrew Waybright (deceased)

Plaintiffs-Appellants

v.

FREDERICK COUNTY, MARYLAND, DEPARTMENT OF FIRE & RESCUE SERVICES; WALTER F. MURRAY, in his official capacity as Fire Emergency Director for the Frederick County Department of Fire & Rescue Services; JEFFREY COOMBE, in his official capacity as training officer for the Frederick County Department of Fire & Rescue Services; STANLEY POOLE, in his official capacity as a member of the Frederick County Department of Fire & Rescue Services; FREDERICK COUNTY; JAN H. GARDNER, in her individual and official capacity as a member of the Frederick County Board of Commissioners; DAVID GRAY, in his individual and official capacity as a member of the Frederick County Board of Commissioners; ANDREW MARSH, in his individual and official capacity as an officer in the Frederick County Department of Fire & Rescue Services; MARK MCNEAL, in his individual and official capacity as an officer in the Frederick County Department of Fire & Rescue Services; TERRE RHODERICK, in his individual and official capacity as a member of the Frederick County Board of Commissioners; JOHN L. THOMPSON, JR., in his individual and official capacity as a member of the Frederick County Board of Commissioners; and RICHARD WELDEN, in his individual and official capacity as a member of the Frederick County Board of Commissioners,

Defendants-Appellees

On Appeal from the United States District Court for District of Maryland in Case No. 1:05-Cv-000055-RDB (Hon. Richard D. Bennett, District Judge)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

CASES

Page(s)

CASES

STATUTES

REPLY TO DEFENDANTS' STATEMENT OF FACTS

Defendants' counterstatement of the facts is a curious, thoroughly self-inculpating declaration. Defendants challenge few of the facts asserted by Plaintiffs and thereby concede their truth. When they do comment on the facts, Defendants misstate them or make astonishing, dispositive concessions from which they cannot now retreat. Defendants' discussion of the facts of import here, and Plaintiffs' reply to them, follow.

Defendants' Contention:

Appellants have received workers' compensation benefits from Andrew Waybright's employer under its workers' compensation insurance policy. (JA 634). In addition, Appellants, on a monthly basis, have received and continue to receive line-of-duty death benefits. (JA 315-16). Defs.' Br. at 2.

Plaintiffs' Reply:

Defendants' assertion is factually incorrect and legally untenable.

Plaintiffs applied for workers' compensation benefits but were denied following a hearing before the Maryland Workers' Compensation Commission. Defendant Maryland Department of Fire & Rescue Services (the "Fire Department") argued that Plaintiffs were precluded from recovery because they were not financially dependent on their son when he died; the Commission

agreed.[1] Only Mr. Waybright's emergency room and funeral bills were paid by the Fire Department's insurer, as the law required.[2] Nothing has been paid to Plaintiffs.

More importantly, the exclusivity provisions of workers' compensation statutes do not curtail an employee's pursuit of a 42 U.S.C. § 1983 ("§ 1983") action against his employer. This is not controversial. *See e.g.*, *Morgan v. Morgensen***,** 465 F.3d 1041, 1044 n.1 (9th Cir. 2006) ("The availability of a remedy under state workers' compensation law does not preclude a § 1983 claim.").[3]

Defendants' Contention:

In developing and expanding the [recruit] program, Department employees visited neighboring jurisdictions to observe the operation of other recruit programs. (JA 346-47, 435-36, 529-31). For instance, Appellee Marc McNeal visited academies located in Howard County, Maryland, Montgomery County, Maryland and Loudoun County, Virginia. (JA 435-36). Also, Appellee Coombe visited Loudoun County where he observed and participated in that County's academy's physical training program. (JA 529-31).

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1 J.A. 635-36.

2 J.A. 994-95.

3 *See also Stephens v. County of Albemarle*, WL 2076417 (W.D. Va. 2005); *McClary v. O'Hare*, 786 F.2d 83 (2nd Cir. 1986); R*osa v. Cantrell,* 705 F.2d 1208, 1221 (10th Cir. 1982), *cert. denied,* 464 U.S. 821 (1983).

The recruit program also benefited from the Department's membership in the Council of Academies. (JA 407). The Council of Academies is an organization of jurisdictions that conduct state level firefighter courses at the local level. (JA 407). Frederick County had been a member of the Council of Academies even before the start of the recruit program, being admitted sometime in the early 1990's. (JA 408-09). Those involved with the Department's recruit program attended these meetings. (JA 412). Defs.' Br. at 5-6.

Plaintiffs' Reply:

This is an astonishing admission by Defendants. Despite their self-avowed learning from observing the recruit programs of neighboring jurisdictions and their membership in the Council of [Fire] Academies, which entailed the study of state firefighter courses, such learning was entirely non-availing in Frederick County. Despite this heightened awareness of how safety is achieved, neither the Fire Department nor the County Commissioners prevented Defendant Coombe's unwise, unsafe and even cruel behavior toward his recruits. Moreover, virtually none of the safety measures used at other fire department training facilities existed at Frederick County's facility.

Defendants' Contention:

As the recruit program continued to grow, a decision was made to invite independent instructors to observe the operation of the classes. (JA 358). [. . .] Moreover, and specifically pertaining to the physical training aspect of the recruit program, early on in the program the Department sent certain individuals, including Appellee McNeal, for specialized training. (JA 363). Specifically, these individuals attended a program and were trained as physical fitness coordinators, though the program through which they were certified would ultimately be discontinued. (JA 363-64). Defs.' Br. at 6-7.

Plaintiffs' Reply:

These assertions, like those discussed immediately above, simply point to Defendants' heightened awareness, *inter alia*, of the safe training of physical fitness. Why didn't the Fire Department check Defendant Coombe's qualifications to lead a recruit class? Why was Defendant Coombe not sent for this training? Why would Defendants allow recruits, such as Mr. Waybright, to be trained by someone who had no training himself?

Defendants' Contention:

With regard to the Frederick County instructors, most came from the field, *i.e.,* from Frederick County fire stations where the instructors worked as firefighters. Defs.' Br. at 7.

Plaintiffs' Reply:

These assertions, even if true, have nothing whatsoever to do with Defendant Coombe's background. First, the instructors referenced were officers in their respective firefighter battalions and, except one officer (who was not assigned to Mr. Waybright's recruit class), did not teach physical fitness.

Defendants' Contention:

At no time were specific recruit classes to be held if the requisite amount of instructors per the Maryland Fire and Rescue Institute ("MFRI") were not available. (JA 352). It is notable that as of 2002, MFRI did not offer a firefighter physical training class. (JA 416). Defs.' Br. at 7.

Plaintiffs' Reply:

This is yet another astonishing admission. All of the record evidence points to the fact that the "requisite number of instructors" were not available to Defendant Coombe on the day that he trained and led Mr. Waybright to his death. Defendants concede: "[U]pon arriving at the Training Center on July 3, 2002, [Defendant] Coombe discovered that, despite his request for an additional instructor to follow the off-campus exercise, no such person was present." Defs.' Br. At 13.

The Board of Inquiry, whose members included several of the instant Defendants, concluded, *inter alia*, that the Fire Department should not conduct

another recruit class until it had budgeted and obtained funds for sufficient full-time staff and had hired and trained them, and that it must establish minimum staff levels for all physical training exercises.[4]

Defendants' Contention:

For Recruit Classes I-VI, the overall administration, which included scheduling and other logistical matters, was carried out by Appellee Stan Poole, Appellee McNeal and a Lieutenant Kevin Finnin. [. . .] Class VI, the class in which Mr. Waybright was a recruit, was administered by Lieutenant Finnin. (JA 337-38). Defs.' Br. at 7-8.

Plaintiffs' Reply:

Defendants baldly say that Mr. Waybright's recruit class was administered by Lt. Finnin. Defs'. Br. at 8. The problem is that on the sweltering day of Mr. Waybright's intense physical exercise, Lt. Finnin had taken the day off, leaving the class in the hands of Defendant Coombe, who not only lacked any formal training, but was unqualified to run such a class. Once again, it is impossible to see why Defendants regard this point as availing their defense.

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[4] J.A. 614.

Defendants' Contention:

Appellants' attempt to reduce Appellee Poole's decision to proceed with Recruit Class VI to a matter of simply avoiding paying overtime (Appellants' Br., p. 9) is just inaccurate and ignores what the record actually shows. (JA 344). Defs.' Br. at 8 n.4.

Plaintiffs' Reply:

Defendants cite page 344 of the Joint Appendix as proof that Defendant Poole's decision to proceed with Mr. Waybright's recruit class was not simply a matter of avoiding paying overtime. Nothing on that page supports their contention.

Defendants' Contention:

In preparation for Recruit Class VI, the recruit program's instructors attended a safety orientation held at the Training Facility. (JA 453-58). The orientation was developed by a MFRI instructor, and it covered various safety related topics. (JA 454-56). It addressed safety measures to be taken when teaching classes at the Training Facility. (JA 456). All instructors were to attend the orientation, and Appellee Coombe did attend. (JA 455-56). Defs.' Br. at 9-10.

Plaintiffs' Reply:

The difficulty with this and Defendants' other observations is that they fail to see the irony of the very point that they posit. Here, of course, Defendants should be attempting to explain why Defendant Coombe either learned nothing from the safety orientation or deliberately chose to disregard what he learned.

Defendants' Contention:

Before the start of Recruit Class VI, each recruit that had been accepted into the recruit program received a letter [which] directed them to begin acclimating themselves to the present summer weather conditions and to "start hydrating." (JA 533-34). It was expected from the new recruits that they consume at least one gallon of water daily in order to keep hydrated. (JA 533-34). Defs.' Br. at 10.

Plaintiffs' Reply:

This demonstrates Defendants' knowledge of the importance of hydration in hot weather conditions and the need for acclimating themselves to the hot weather conditions they would face. Nevertheless, the letter that Defendants are trumpeting was not received by the recruits until four days before the start of the training program. Furthermore, it gave no indication as to how they should acclimate themselves. The Board of Inquiry found that "[w]ith the letter dated June 21, 2002, and the class starting July 1, 2002, there was little time to accomplish that task."[5]

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[5] J.A. 559.

Defendants' Contention:

The letter also required the recruits to bring, among other things, "a one-gallon (minimum) water container" to be carried with the recruits at all times for hydration during Recruit Class VI. (JA 533-34).

* * *

Additionally, as they had been instructed to bring, all the recruits had their own gallon bottles of water. (JA 489, 532). Defs.' Br. at 10, 14.

Plaintiffs' Reply:

Defendants fail to tell the Court that the recruits, just before they embarked on their rigorous run, left all their water bottles at the training facility. It was physically impossible for the recruits to run with one gallon water jugs that they had been told to bring with them to the training facility. After leaving the facility, Defendant Coombe denied the recruits water during their arduous one-hour run in hot weather and no arrangements had been made to provide the recruits water on the route or during physical training.

Defendants' Contention:

With regard to the physical training portion of the program, Appellee Coombe was the instructor. He had previously served in this same position for Recruit Classes IV and V and, based on past student evaluations, he was one of the highest ranking instructors in the program. (JA 365, 481). [. . .] Defendant

Coombe had years of service and training and was himself a graduate of the Department's Recruit Class II. (JA 479, 483). Defs.' Br. at 11-12.

Plaintiffs' Reply:

Plaintiffs are unsure as to what Defendants' point is here. The graduate recruits from earlier classes lacked the expertise to opine on qualifications of a fitness training instructor. Finally, much as it is fortuitous that Defendant Coombe's prior recruits had passed the shorter, six-week course without dying, one should not forget that Defendant Coombe lacked any training in teaching or leading physical fitness.[6] His only experience in the field was completing his own recruit training.

Defendants' Contention:

Appellee Coombe, leading the physical training that day, worked under the assumption that the recruits had maintained the same level of physicality needed to pass the CPAT. (JA 490). Defs.' Br. at 12.

Plaintiffs' Reply:

On the contrary, a person such as Defendant Coombe, when responsible for the lives of fresh recruits, must assume nothing about their individual readiness for vigorous and, in this case, unreasonable exercise carried out in hot weather. Waybright and the other recruits took the CPAT more than seven months before

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[6] J.A. 650-51.

beginning training; Defendants' own expert admitted that by then the CPAT test results lacked any validity.[7] Once again, Defendants' position is a concession of guilt because Defendant Coombe is chargeable with the duty of knowing the recruits' conditioning at that time.

Defendants' Contention:

On the morning of July 3, 2002, Appellee Coombe, before leaving his house, checked the Weather Channel in preparation to leading the exercises that day. (JA 495). Defs.' Br. at 13.

Plaintiffs' Reply:

This assertion encapsulates Defendant Coombe's testimony before the Board of Inquiry. It directly contradicts, however, Defendant Coombe's subsequent sworn testimony at the Frederick County Commissioners' hearing convened to review the punishment meted out to Defendant Coombe as a result of Mr. Waybright's death.[8]

Defendant Coombe admitted that what he had originally told the Board of Inquiry was a lie, and that he had not seen a weather forecast since at least July 1, 2002.[9] The U.S. Weather Service predicted a Code Red weather condition for July

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[7] J.A. 894-95, 905-06.

[8] J.A. 663-812.

[9] J.A. 660, 710-715, 723-24.

3, 2002.[10] Defendant Coombe admitted to the County Commissioners that he arrived at the training center on July 3, 2002 tired from a thirty-six-hour shift and having no idea what weather was forecast.[11]

Defendants' Contention:

Appellee Coombe understood that the Department maintained an outdoor weather policy prohibiting outdoor activities when the heat index reached 110 degrees Fahrenheit. (JA 486, 585-88). The Weather Policy applied to all instructors and required them to monitor weather conditions. (JA 585-88). The Policy was consistent with accepted fire service practice. (JA 601). Defs.' Br. at 13.

Plaintiffs' Reply:

Defendants' assertion is self-evidently absurd.

First, are Defendants saying that Defendant Coombe was right in subjecting his recruits to vigorous exercise at a heat index that made them exhibit obvious signs of heat distress?

Second, one is left to wonder how Defendants can aver that their policy was "consistent with accepted fire service practice", when the Board of Inquiry found just the opposite.[12]

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10 J.A. 601.

11 J.A. 679-80, 712, 778.

12 J.A. 601.

Third, the 110-degree standard as the maximum in which physical exercise could be carried out was clearly excessive, as the events of July 3, 2002 demonstrate. Defendants also fail to tell the Court that, following Mr. Waybright's death, Defendants adopted a policy that required suspension of all training activities when the heat index reached 86 degrees.[13]

Finally, while Defendants consider it important for the Court to know that Defendant Coombe "understood" the Fire Department "maintained an outdoor weather policy," it is undisputed that neither Defendant Coombe nor Defendants' training facility monitored the temperature or heat index on the day that Mr. Waybright died.[14]

Defendants' Contention:

Appellants' assertion that Appellee Coombe "elected" not to take the Gator (Appellants' Br., p. 6) inaccurately implies that the Gator was available. The Gator was not taken because it was inaccessible to him. (JA 522)

* * *

[T]he Gator and radio [were] unavailable because the keys to access the equipment were locked in a room inaccessible to him (JA 522-23). The room was only accessible to those with offices in the Training Center. (JA 522-23). None of

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[13] J.A. 312.

[14] J.A. 660.

these individuals had yet arrived. (JA 522-23). These circumstances on July 3 were out of the ordinary; this was the first time Appellee Coombe arrived to conduct physical training exercises to find that those with the keys to access the Training Facility were absent. Defs.' Br. at 13-14.

Plaintiffs' Reply:

Defendants argue that this was the first time that the Gator[15] was not available to support a recruit training session. This observation, however, does not in any way exculpate Defendants or justify the unbridled discretion that the Defendants ceded to the untrained Defendant Coombe.

When Defendant Coombe arrived at the training facility and realized the Gator would not be available, the severity of the heat (hence the recruits' need for water) and the danger that morning was obvious. Any emergency would require communications equipment and would require any prudent training instructor to delay or cancel the physical training session if it was unavailable. Defendant Coombe, however, went on with it -- reflecting (once again) his deliberate indifference to the health and safety of the recruits for whom he was responsible.

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[15] The "Gator" is a small vehicle on which the driver carried water, medical supplies and communications equipment for use in emergencies involving recruit training exercises. J.A. 325-26, 353, 360, 451-53, 456-457, 514-15, 673.

Defendants' Contention:

On the jog back to the Training Facility, Defendant Coombe was notified that Mr. Waybright was experiencing problems. (JA 499). Defs.' Br. at 15.

Plaintiffs' Reply:

As if to distance Defendant Coombe from direct awareness of Mr. Waybright's rapidly deteriorating condition, Defendants refer to Defendant Coombe being "notified" by a fellow trainee that Mr. Waybright was on the verge of collapse. Either Defendant Coombe was oblivious to Mr. Waybright's peril or he was witnessing the peril and doing nothing. Defendant Coombe was derelict in his duty and was so charged by the Fire Department. The evidence compels the conclusion that Mr. Waybright was perishing before Defendant Coombe's very eyes. Moreover, as noted in Plaintiffs' Statement of Facts, when Mr. Waybright became unconscious, but was still alive, Defendant Coombe abandoned him and was disciplined by Defendants for doing so.

Defendants' Contention:

Mr. Waybright, however, then began to stumble, and Appellee Coombe and Fire Fighter Eckhoff asked Mr. Waybright to sit down on the grass. (JA 501). Mr. Waybright refused wanting to finish the exercises with his class. (JA 501).

* * *

Appellee Coombe and Fire Fighter Eckhoff managed to have Mr. Waybright sit down, at which time Mr. Waybright began to crawl on his hands and knees back towards the Training Facility stating that he wanted to finish with his class. (JA 501-02). At this point, Appellee Coombe observed that Mr. Waybright was exhibiting signs of heat stress necessitating assistance. (JA 503). Defs.' Br. at 15-16.

Plaintiffs' Reply:

In a tasteless and evidence-defying recounting of the facts, Defendants here make it seem as if Mr. Waybright was improvident in his pursuit of the finish line and that this occasioned his death. In fact, however, the only pertinent, objective evidence indicates that on a morning of deadly heat, Defendant Coombe had specifically berated Mr. Waybright thirty minutes before his collapse because he was not exercising hard enough.[16]

Defendants' Contention:

The Board made certain recommendations in an attempt to prevent future occurrences. (JA 387). The recommendations made by the Board were used to revamp the recruit program. (JA 470). Specifically, changes were made to the physical training portion of the program. (JA 471). The Department hired a wellness and fitness coordinator, and physical training activities are now based

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[16] J.A. 831.

upon individual assessments of each recruit, which in turn yields a baseline performance level for the entire class. (JA 472,473-74). Additionally, before recruits begin a session of physical training, each recruit's blood pressure, heart rate and weight is measured for monitoring purposes. (JA 475). Defs.' Br. at 19.

Plaintiffs' Reply:

Defendants' laundry list of ameliorative changes in the training program following Mr. Waybright's death only underscores Defendants' deliberate indifference to his health and safety before his death.

REPLY TO DEFENDANTS' ARGUMENT

A. *Collins v. City of Harker Heights, Tx.*

A central theme of Defendants' argument is that Plaintiffs' "case rests upon allegations of an unsafe work environment" and therefore is not actionable under *Collins v. City of Harker Heights, Tx.*, 505 U.S. 115 (1992).

Defendants' analysis ignores the difference between "negative liberty" and "positive liberty" -- substantive due process claims discussed at length in Plaintiffs' opening brief. Pls.' Br. at 26-28. This key distinction is nowhere discussed by Defendants. As a result, their reasoning fails almost immediately.

Plaintiffs have asserted a negative liberty claim, while the widow in *Collins* asserted a positive liberty. Supreme Court jurisprudence makes clear that in the context of the Due Process Clause, the negative nature of constitutional rights

imposes on the state no affirmative obligation to act absent some special circumstance such as custody or a state-created danger (the only viable positive liberty claims). *See DeShaney v. Winnebago Cnty Dept. of Social Servs.*, 489 U.S. 189 (1989); *Pinder v. Johnson*, 54 F.3d 1169, 1178 (4th Cir. 1995).

Thus, the Bill of Rights protects individuals from the government but does not oblige the government to furnish protection against private tortfeasors. *Id.* *Collins* reflects this principle.

In *Collins*, a city sanitation department worker, untrained in appropriate safety practices by the city, died of asphyxia after entering a manhole to clear a sewer line. His widow brought a § 1983 action against the city on the theory that her husband "had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and had a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees." *Id.* at 117. The Court rejected this: "Neither the text nor the history of the Due Process Clause supports [a] claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause." *Id.* at 126. Plaintiffs do not take issue with this -- Plaintiffs' claim is not predicated on an entitlement to a safe workplace.

By contrast, this case concerns Mr. Waybright's right not to be injured by the State -- a "negative liberty." Liability is triggered when the government affirmatively acts to deprive a citizen of a constitutional right. The instant case reflects this principle, which this Court embraced in *Pinder*: "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." 54 F.3d at 1177.

Defendants' reliance on *White v. Lemacks*, 183 F.3d 1253 (11th Cir. 1999) is likewise misplaced. Defs.' Br. at 28, 33, 34, 46. There, the plaintiff-nurses were attacked by inmates after plaintiffs had received assurances that there were adequate security measures to keep them safe. As a condition of their job the nurses were required to work in close proximity to inmates and their freedom of movement and ability to flee, or otherwise protect themselves, was limited.

The Eleventh Circuit characterized the issue as whether the defendants were required "to provide more guards or other safeguards for the protection of nurses working in the jail infirmary." *Id.* at 1258. Accordingly, the Eleventh Circuit stated that the plaintiffs' claim was one of "resource-allocation choices . . . dressed up in substantive due process clothing [.]" *Id.* Relying on *Collins*, the court held that plaintiffs had failed to state a substantive due process claim because "[w]hile

deliberate indifference to the safety of government employees in the workplace may constitute a tort under state law, it does not rise to the level of a substantive due process violation under the federal Constitution." *Id*. at 1259.

A careful analysis of *White*, however, shows that it is readily distinguishable from the instant case. *See Stebner v. Utah Dept. of Corrections*, 2000 WL 33710898 (D. Utah 2000).

In the district court opinion in *White,* the court held that "Plaintiffs have failed to allege any facts showing any affirmative action or culpable conduct by the Defendants sufficient to create liability under the special danger doctrine."

In contrast with *White,* Plaintiffs here do allege that Defendants took affirmative steps to create a danger. Unlike *White,* this is not a case in which the defendants simply failed to make adequate safety preparations. Here, Defendants not only failed to provide a safe environment, they were the ones who affirmatively created a situation in which serious injury to Mr. Waybright was foreseeable and likely to occur.

Thus, *White* is consistent with Plaintiffs' position that substantive due process claims only extend to those cases where the state actor has taken affirmative steps, with the knowledge that those actions create a danger to the plaintiff or is deliberately indifferent to that danger.

The bottom line is this: Plaintiffs do not contend that Defendants are liable because they failed to provide their son with a safe place to work. Rather, Plaintiffs contend that a government tortfeasor -- through affirmative (and reckless) acts -- violated their son's Fourteenth Amendment right not to be deprived of his life "without due process of law." This case is not *Collins*.[17]

All of these points are illustrated by *Jensen v. City of Oxnard*, 145 F.3d 1078 (9th Cir.), *cert. denied*, 525 U.S. 1016 (1998). There, police Officer Jensen was shot and killed by a fellow officer, Sergeant Christian, during a SWAT team raid. *Id.* at 1081-82. Officer Jensen's widow brought a § 1983 action against Sergeant Christian, the police chief and the city alleging that her husband's civil rights were violated when he was shot and killed.

In her complaint, Mrs. Jensen alleged that the "City of Oxnard: (1) failed to adequately train or equip the members of the SWAT team; (2) failed to control those members of the SWAT team who have a known propensity for violence; and (3) failed to investigate SWAT team members for potential substance abuse and/or mental problems." The complaint specifically alleged "that the police chief,

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[17] Defendants' confusion is illustrated by this assertion: "In this case, because substantive Due Process does not require the government to provide minimal levels of safety in the work place, Appellee Coombe's alleged deliberate indifference when deciding to proceed with the physical training exercises without water, without the Gator and without radio communications cannot rise to the requisite conscience-shocking level." Defs.' Br. at 28-29.

assistant police chief, and police commander assigned Sergeant Christian to the SWAT team 'knowing that he was using mind-altering drugs.'"[18] *Id*. at 1082.

Defendants moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. *Id*. The district court denied the motion and defendants appealed.

The Ninth Circuit concluded that the "complaint adequately states a cause of action "[because] it alleges that Oxnard violated Officer Jensen's Fourth and Fourteenth Amendment rights in two respects: (1) Sergeant Christian used excessive and unreasonable deadly force; and (2) the City of Oxnard and various officials in the Oxnard Police Department acted with deliberate indifference to the maintenance, training, and control of its SWAT teams, and that indifference was a proximate cause in Sergeant Christian's violation of Officer Jensen's constitutional rights." *Id*. at 1083. "In other words, Jensen alleges that Sergeant Christian was highly likely to inflict the particular injury suffered by Officer Jensen as a result of Oxnard's deliberate indifference towards the staffing and training of its SWAT teams". *Id*. (quotation marks omitted).

Citing *Collins*, defendants argued that "Officer Jensen could not have had any of his rights violated because he was injured while performing his duties as a

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[18] These allegations, the court concluded, were "sufficient to allege a plausible link between the policymaker's inadequate decision and the particular injury alleged." *Jensen*, 145 F.3d at 1083 (internal quotation marks omitted).

police officer." *Id*. The court rejected defendant "Oxnard's attempt to turn this into a safe workplace case." *Id*. at 1083-84. The court reasoned that "although this case is similar to the safe workplace cases in that they both concern individuals who 'voluntarily accepted ... an offer of employment,' [*Collins*, 505 U.S. at 128] this case is different in one significant way -- the nature of the injury alleged." *Id*. at 1085. **"While the safe workplace cases concern the failure of the state adequately to train, prepare, or protect government employees from non-state actors, this case involves the allegedly intentional or reckless acts of a government employee directed against another government employee."** *Id*. (footnote omitted, emphasis supplied.) *Jensen* is this case. *See also Hawkins v. Holloway,* 316 F.3d 777, 787 (8th Cir. 2003) ("T]he facts demonstrate that the sheriff deliberately abused his power by threatening deadly force as a means of oppressing those employed in his department, thus elevating his conduct to the arbitrary and conscience shocking behavior prohibited by substantive due process."); *Eddy v. Virgin Islands Water and Power Authority,* 955 F.Supp. 468, 475, *reconsidered,* 961 F.Supp. 113 (D. Vi. 1997).

B. Commissioner Cady

Following Mr. Waybright's death, the police considered charging Defendant Coombe with criminal negligence.[19] That this investigation occurred is mentioned in the transcript of the County Commissioners' deliberations regarding the punishment to be meted out to Defendant Coombe for the grievous wrongs he committed on July 3, 2003. In their brief, Defendants refer to the following colloquy that occurred between Commissioner Michael L. Cady[20] and another Commission member:

> Commissioner Cady: I don't understand why criminal charges weren't filed against this man.
>
> Commissioner Gardner: Well, just in response to that last thing you also haven't seen is the police did a full investigation of this, and they did not find any criminal negligence and so that was the investigation that you have not seen, those of us who were here during that time did.[21]

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[19] In Maryland criminal negligence "is defined as a wanton or reckless disregard for human life, a degree of carelessness amounting to a culpable disregard of rights and safety of others." *Ruffin v. State*, 10 Md.App. 102, 106, 268 A.2d 494, 497 (1970). The police records regarding the investigation were not obtained in discovery and therefore are not of record here.

[20] Defendants upbraid Plaintiffs for characterizing Commissioner Cady as a "defendant." Defs.' Br. at 27. Members of the Board of Commissioners are defendants in this litigation in their official capacity only -- they are therefore deemed "formal" parties. *See Conte v. Justice*, 996 F.2d 1398, 1403 (2nd Cir. 1993). Commissioner Cady served on the Board during most of this litigation and, by virtue of his commissioner status, was effectively also a defendant here. That the instant Defendants would avoid telling this to the Court is unfortunate.

[21] J.A. 740.

From this, Defendants draw two conclusions: First, that the colloquy does not evince "any intent to harm" on the part of Defendant Coombe. Second, that "Appellee Coombe's conduct does not support the constitutional claims." Defs.' Br. at 27-28.

There are several problems with Defendants' position. First, the police department's final decision not to press charges against Defendant Coombe is not what is significant here. The burden of proof in a criminal case (*i.e.*, beyond a reasonable doubt) is far higher than the preponderance of the evidence standard that the instant Plaintiffs must meet. Facts that might not support a finding of guilt in a criminal case can (and often do) provide ample evidence of liability in a civil litigation.

Second, what is most telling is that the police believed there was enough evidence of serious wrongdoing to warrant a criminal investigation of Defendant Coombe.

Third, and also of considerable import, is Commissioner Cady's reaction to the evidence the Board heard regarding Defendant Coombe during a two-day trial-like hearing. The same inculpatory evidence which Commissioner Cady heard is of record here (including Defendant Coombe's testimony). All of it.

This is important because Commissioner Cady's words reflect what a reasonable jury could find after hearing the same evidence. Commissioner Cady

was especially well-suited to weigh the evidence against Defendant Coombe because of the Commissioner's background in physical training. He is a Senior International Olympic Coach and a former Marine Corps drill instructor.[22]

Having learned of the police decision not to prosecute, Commissioner Cady later in the hearing said: "I can't believe criminal charges were not involved here, if this was Law & Order, he would be hanged."[23]

Fourth, Commissioner Cady's view of the evidence -- that Defendant Coombe was guilty of criminal negligence -- indicates the conscience-shocking standard of deliberate indifference (and perhaps even intent to harm). This is so because the Supreme Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998) analogized deliberate indifference to "gross negligence."

At a minimum, the instant record establishes a genuine issue as to the most material fact in this case: Whether Defendant Coombe acted with deliberate indifference toward Mr. Waybright.

C. Deliberate Indifference

Defendants next argue that the deliberate indifference test only applies in custodial settings and that "[b]ecause there was no custodial setting in the present case, Appellee Coombe's alleged deliberate indifference to the needs of Mr.

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22 *Id*.

23 J.A. 740-41.

Waybright cannot support Appellants' constitutional claims." Defs.' Br. at 35. Defendants are wrong for several reasons.

Citing *Pinder*, Defendants assert: "[t]his Court has held that a government actor's deliberate indifference to the needs of another manifested in a failure to provide for those needs cannot rise to a 'conscience shocking' level absent a custodial setting." Defs.' Br. at 35. Not only did this Court not discuss the contours of the deliberate indifference standard in *Pinder*, the words "deliberate indifference" never appear in the Court's opinion.

Next, Defendants make the following astonishing assertion: "Appellants' novel argument that the deliberate indifference standard applies to measure Appellee Coombe's conduct solely because Appellee Coombe had 'ample time to deliberate' advances an interpretation of the Fourteenth Amendment unsupported by the case law." Defs.' Br. at 38.

There is nothing "novel" about Plaintiffs' contention. Its source is *Sacramento*, the seminal precedent in this area -- a case which Defendants relegate to a footnote in their brief on this point. Defs.' Br. at 39 n.14. There, the Supreme Court explicitly stated: "[L]iability for deliberate indifference ... rests upon the luxury ... of having time to make unhurried judgments, upon the chance for

repeated reflection, largely uncomplicated by the pulls of competing obligations."[24] *Id*. at 853.

In *Sacramento,* "the Court endorsed the use of the deliberately indifferent standard for cases in which the defendants have the luxury of forethought: 'As the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical.'"

In *Christensen v. County of Boone, IL***,** 483 F.3d 454, 468 (7th Cir. 2007) the Seventh Circuit observed: "Where a defendant has the luxury of proceeding in a deliberate fashion deliberate indifference may be sufficient to shock the conscience." In *Fitzgerald v. Bellmawr Borough*, 2007 WL 2687456 (D. NJ 2007) the court wrote:

> [F]ollowing *Lewis,* the Third Circuit has stated that in substantive due process cases, the exact degree of wrongfulness necessary to reach the conscience-shocking level depends upon the circumstances of a particular case. Indeed, at times, a showing of an intent to cause harm is required but at other times, deliberate indifference may suffice to "shock the conscience" and that the degree of culpability is indirectly proportional to the time a defendant has to deliberate before making a decision or judgment call. (citations and quotation marks omitted.)

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[24] In *Sacramento*, the Court also made clear that "actual deliberation" means more than having a few seconds to think: "By 'actual deliberation,' *we do not mean* 'deliberation' in the narrow, technical sense in which it has sometimes been used in traditional homicide law. *See, e.g., Caldwell v. State,* 203 Ala. 412, 84 So. 272, 276 (Ala. 1919) (noting that "deliberation here does not mean that the man slayer must ponder over the killing for a long time;" rather, "it may exist and may be entertained while the man slayer is pressing the trigger of the pistol that fired the fatal shot[,] even if it be only for a moment or instant of time")." 523 U.S. at 851 n. 11 (emphasis in original).

> *See also Sanford v. Stiles*, 456 F.3d 298, 305-311 (3rd Cir. 2006) (discussing the "jurisprudence on the standard of culpability"); *Perez v. Unified Gov. of Wyandotte County/Kansas City, Kan.*, 432 F.3d 1163 (10th Cir. 2005) ("The [Supreme] Court acknowledged, however, that behavior that would not violate the Fourteenth Amendment if done in a time-sensitive, high-pressure situation may nevertheless shock the conscience if the official has time to deliberate before acting."); *Ziccardi v. City of Philadelphia,* 288 F.3d 57, 58-59 (3rd Cir. 2002) (creating a "new mid-level standard" for circumstances in which "no instantaneous decision is necessary, but where the state actor also does not have the luxury of proceeding in a deliberate fashion.").

The *Sacramento* Court "explained that prison is the quintessential setting for the deliberately indifferent standard because 'in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory.'" *Davis v. Hall*, 375 F.3d 703, 718 (8th Cir. 2004) (citation and quotation marks omitted). However, the Court did not limit the deliberate indifference standard's application to custodial and state-created danger settings and the instant Defendants' contention here (and the trial court's holding) to the contrary is mistaken.[25]

The post-*Sacramento* precedent cited above make this clear. Plaintiffs have adduced ample evidence upon which a reasonable finder of fact could find that

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[25] The D.C. Circuit's precedent relied upon by the instant district court and Defendants limits the deliberate indifference standard to custodial and state-created danger settings and cannot be squared with the Supreme Court's reasoning in *Sacramento* and its application by other circuits. The D.C. Circuit's position is unsupportable and should be rejected by this Court. The D.C. Circuit cases are: *Estate of Phillips v. District of Columbia,* 455 F.3d 397 (D.C. Cir. 2006); *Fraternal Order of Police v. Williams,* 375 F.3d 1141 (D.C. Cir. 2004); *Butera v. District of Columbia,* 235 F.3d 637 (D.C. Cir. 2001).

Defendants were deliberately indifferent to the constitutional rights of Mr. Waybright and that he was harmed thereby.

D. State-Created Danger

By misquoting Plaintiffs' state-created danger argument, Defendants again lamely attempt to convert this case into a *Collins* safe workplace claim: "Appellants argue that Appellees' 'policy of deliberate indifference to the safety of their recruits' created unsafe employment conditions thereby supporting their constitutional claims." Defs.' Br. at 37.

This is what Plaintiffs actually said: "The wrongful conduct of Defendant Coombe and the Supervisory Defendants' policy of deliberate indifference to the safety of their recruits created the 'snake pit' into which Mr. Waybright was thrown and where he died." Pls.' Br. at 36.

Moreover, Defendants are wrong on the law. Defendants aver that state-created danger claims are only actionable if "a plaintiff, *against [his] will and control*, [is] placed by the government in a position of danger by *private third-parties*." Defs.' Br. at 37 (emphasis in original.)

In fact, the cases make clear that this is not an element required to make out a state-created danger claim. This point is illustrated by the Third Circuit's decision in *Rivas v. City of Passaic*, 365 F.3d 181, 194, 197 (3rd Cir. 2004). There, two paramedics responded to a call from a man (Rivas) who was apparently having

a seizure. The paramedics called for police backup and then (1) informed the officers on their arrival that Rivas had assaulted one of the paramedics, which was not true; (2) did not advise the officers about Mr. Rivas's medical condition causing the seizure and (3) ceded control over the situation to the police. *Id*. at 197. As a result, the police restrained Rivas, which caused his death. *Id*. at 184.

The court concluded that plaintiffs had an actionable state-created danger claim against the paramedics and police. This is because, when taken as a whole, the paramedics' actions "created an opportunity for harm that would not have otherwise existed [and were] it not for those acts, Mr. Rivas presumably could have remained in the apartment's bathroom for the duration of his seizure without incident." *Id*. at 197.

As in *Rivas*, Mr. Waybright was put in harm's way by state actors and, as in *Rivas*, his death was caused by another state actor (*i.e*., Defendant Coombe).

Plaintiffs' state-created danger § 1983 claim is plainly actionable.

E. Supervisory Liability

Finally, Defendants argue that Plaintiffs' supervisory liability claims are not actionable "[b]ecause Appellee Coombe's supervisors had no reason to believe an injury would occur as it did." Defs'. Br. at 43. Defendants' argument is fundamentally flawed for these reasons:

Defendants assume (wrongly) that Plaintiffs' supervisory-liability theory requires proof, *inter alia*, that Defendant Coombe had engaged in the wrongful conduct at issue on "at least . . . several different occasions." Defs.' Br. at 44. citing *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994). By its nature, however, such conduct, occurs "[o]utside of . . . formal decisionmaking channels." *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999). "It is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

Plaintiffs here, however, are not claiming that the Defendants' supervisory liability stems from allowing repeated wrongful conduct. Rather, the Supervisory Defendants' liability results from their "formal decisionmaking," as detailed in Plaintiffs' opening brief. *See* Pls.' Br. at 37-42. The Supreme Court's observation in *City of Canton, Ohio v. Harris* is particularly apt here: "It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees." 489 U.S. 378, 390 (1989). "But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id*.

The Supervisory Defendants knew that their training program was unsafe and discussed the problem months before Mr. Waybright began the program.[26] The Defendants then compounded the problem by placing the untrained and incompetent Defendant Coombe in a position where he had unbridled discretion. Indeed, the Board of Inquiry concluded: Defendants "placed [Defendant Coombe] in a position with supervisory responsibilities for which he was not prepared."[27]

It was just a matter of time until someone would be hurt. The Supervisory Defendants' decisions described *supra*, and in Plaintiffs' opening brief, resulted in Mr. Waybright's death. *See* Pls.' Br. at 37-42.

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[26] J.A. 1077-78.

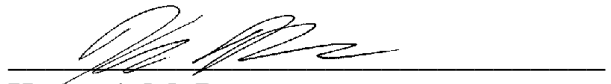
[27] J.A. 605.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiffs' opening brief, the Court should reverse the district court's grant of summary judgment and remand the case for trial.

Respectfully submitted,

BERMAN, SOBIN & GROSS, LLP



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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1289
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November 9, 2007

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On the **9rd Day of November, 2007**, I served the within **Reply Brief for Plaintiffs-Appellants** upon:

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