IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MARY SMITH and GEORGE SMITH, Individually, and MARY SMITH, as Administrator of the ESTATE OF MARCUS DEON SMITH, deceased,	)	
Plaintiffs,	)	
v.	)	Case No. 1:19CV386
CITY OF GREENSBORO, et al.,	)	
Defendants.	)	

PLAINTIFFS' COMBINED RESPONSE BRIEF IN OPPOSITION TO DEFENDANT EMS PARAMEDICS' AND DEFENDANT GUILFORD COUNTY'S MOTIONS TO DISMISS

INTRODUCTION

Defendant Guilford County EMS Paramedics Ashley Abbott and Dylan Alling were dispatched to provide medical assistance to Marcus Deon Smith who was experiencing a mental health crisis. When they arrived on the scene they witnessed the Greensboro Officer Defendants take Marcus to the ground, roll him onto his stomach in the prone position, handcuff his hands behind his back and use extreme and unreasonable force to hogtie him with a restraint device, yet they failed to intervene to protect Marcus from being injured. They stood idly by and watched as the Officer Defendants' excessive use of force rendered Marcus unconscious. They knew that Marcus had stopped breathing and was unresponsive, yet they chose to wait longer than two minutes to begin any resuscitative efforts. By the time they finally made some attempt to resuscitate him after placing him in the ambulance, their efforts were unsuccessful, and he was later pronounced dead.

Plaintiffs' primary claim against the Paramedic Defendants is that they failed to provide Marcus with prompt medical care in violation of his constitutional rights.[1] The Paramedic Defendants move to dismiss this claim, contending that their misconduct does not rise to the level of a constitutional violation, that they had no constitutional duty to provide prompt medical care because Marcus was not "in custody" at the time of the assault, and that they are entitled to qualified immunity.[2] None of these arguments have merit. Since Plaintiffs have alleged a viable

[1] Plaintiffs are not asserting a bystander liability claim against the Paramedic Defendants. Rather, Plaintiffs allege that the Paramedic Defendants acted jointly and in conspiracy with the Officer Defendants to restrain and hogtie Marcus and that this conduct in addition to their failure to intervene to protect Marcus from being injured by the Police Defendants is part and parcel of the failure to provide prompt medical care claim, but not a separate claim unto itself.

[2] Plaintiffs' only claim against Defendant Guilford County is for *respondeat superior*, yet the County has filed a 25-page brief that asserts a myriad of arguments, most of which appear to be made on behalf of the Paramedic Defendants. Since Guilford County does not have standing to make arguments on behalf of another defendant, these arguments should be disregarded.

and clearly established federal claim against the Paramedic Defendants, the motion to dismiss should be denied.

STANDARD OF REVIEW

Plaintiffs incorporate by reference the standard of review section contained in their response to the Officer Defendants' motion to dismiss.

STATEMENT OF FACTS CONCERNING THE PARAMEDIC DEFENDANTS

Marcus Deon Smith was a 38 year-old African American man, who had been diagnosed with bipolar disorder and schizophrenia, which manifested in episodes of psychosis, with symptoms including delusions, paranoia, hallucinations and altered mental status, and it substantially limited major life activities including concentrating, thinking and communicating. Compl. ¶ 22.

On September 8, 2018, shortly after midnight, the Defendant Greensboro Police Officers encountered Marcus Deon Smith on North Church Street in Greensboro near the North Carolina Folk Festival that was happening downtown. *Id.* ¶ 23. Marcus was pacing back and forth in the street and running around in circles. *Id.* ¶ 24. He appeared exasperated and frantic and was waving his arms in the air. *Id.* ¶ 24. He begged the officers for help, repeatedly stating, "Please help me, sir," and asked to be taken to the hospital. *Id.* ¶ 24. Marcus had not committed a crime, he was not engaged in any criminal conduct, he was not trying to flee, he was unarmed, he was not violent, he made no threats to the Defendants or others, and he presented no immediate danger to the Defendants or others. *Id.* ¶ 27, 53. The Officer Defendants believed that Marcus was under the influence of drugs and could see that he was extremely agitated, afraid, and in the throes of a mental health crisis. *Id.* ¶ 25-26.

The Officer Defendants called an ambulance to take Marcus to a hospital, and while waiting for the ambulance to arrive, asked Marcus to get in the back of one of the police cars and told him they would take him to the hospital. *Id.* ¶ 28. Marcus voluntarily entered the back of a police car, but after a short period of time of being alone in the car with no one driving him to the hospital as Defendants told him they would do, he began to panic and thrash around because he wanted to get out. *Id.* ¶ 29. Marcus was not under arrest. *Id.* ¶ 30. He tried to open the door of the car, but it was locked, so he banged his hand against the window to get the Police Defendants' attention. *Id.* ¶ 30.

By this time, Defendant Guilford County EMS Paramedics Abbott and Alling arrived on the scene. *Id.* ¶ 33. One of the Officer Defendants spoke with Defendant Abbott and reported his observations of Marcus's behavior and Abbott responded by asking, "is he a black guy?" to which the officer responded, "yes." *Id.* ¶ 34.

The Police Defendants then opened the door of the car and Marcus quickly got out. *Id.* ¶ 35. Marcus did not kick or hit or threaten any of the Defendants or others as he got out of the car. *Id.* ¶ 36. The Police Defendants grabbed Marcus, forced him down to the ground and then rolled him onto his stomach in the prone position. *Id.* ¶ 37. Marcus cried out in pain and said, "please don't do that!" and "I'm not resisting!" Marcus was grunting and groaning and moving his body, but he was not actively resisting the Defendants. *Id.* ¶ 38. The Police Defendants held Marcus down and handcuffed Marcus's hands behind his back. *Id.* ¶ 39.

The Police Defendants then hogtied Marcus while he was prone on the ground with a hobble restraint. *Id.* ¶ 32, 40. One officer grabbed Marcus's ankles and pushed Marcus's feet toward his hands with extreme and unnecessary force, bending Marcus's knees well beyond a 90 degree angle and pushing Marcus's feet all the way to the point that they were touching his

handcuffed hands at the small of his back. *Id.* ¶ 40. The officers used the hobble device to bind Marcus's hands to his feet behind his back while continuing to violently push Marcus's feet toward his back, causing Marcus's knees to continue to be bent well beyond a 90 degree angle and then tightened the strap on the hobble device so tight that Marcus's shoulders and his knees were suspended above the ground. *Id.* ¶ 41-42. The manner and extreme force with which the Officer Defendants restrained Marcus and applied the hobble device placed extreme stress on Marcus's chest and severely compromised his ability to breathe. *Id.* ¶ 43. While he was being restrained and hogtied, Marcus was wheezing, moaning, groaning, gasping for air, and in obvious respiratory and physical distress. *Id.* ¶ 44. Marcus's breathing quickly became strained and less than half a minute later he became unable to breathe and was unresponsive. *Id.* ¶ 45.

Defendants Abbott and Alling were standing next to Marcus during the prone restraint and hogtying and failed to intervene on his behalf. *Id.* ¶ 48. They saw that excessive use of force by the Officer Defendants had rendered Marcus unconscious, they knew that Marcus was not breathing and unresponsive, yet they chose to not provide immediate resuscitative efforts and instead waited longer than two minutes to do so. *Id.* ¶ 51, 67. When they finally did attempt to resuscitate Marcus after placing Marcus in the ambulance, their efforts were unsuccessful, and he was later pronounced dead. *Id.* ¶ 51-52.

The North Carolina Office of the Chief Medical Examiner determined that the manner of death was "homicide" and the cause of death was "sudden cardiopulmonary arrest due to prone restraint; n-ethylpentalone, cocaine, and alcohol use; and hypertensive and atherosclerotic cardiovascular disease." *Id.* ¶ 52.

QUESTIONS PRESENTED

I. Whether Plaintiffs Complaint plausibly alleges sufficiently culpable conduct by the Paramedic Defendants to state a claim for failure to provide prompt medical care?

II. Whether the Paramedic Defendants had a constitutional duty to provide prompt medical attention after Marcus stopped breathing?

III. Whether the Paramedic Defendants are entitled to qualified immunity?

IV. Whether Plaintiffs' state law wrongful death and *respondeat superior* claims should be dismissed?

ARGUMENT

I. Plaintiffs' Complaint Plausibly Alleges Sufficiently Culpable Conduct to State a Claim for Failure to Provide Prompt Medical Care

Defendants argue that Plaintiffs' claim for failure to provide prompt medical care should be dismissed because the Complaint "fails to plausibly allege sufficiently culpable conduct by the paramedics." Def. Br. at 7. Specifically, the Paramedic Defendants assert that the factual allegations concerning their inaction—which they greatly minimize and describe simply as taking a "short pause prior to commencing resuscitation efforts in a well-equipped county ambulance"—do not "shock the conscience" or rise to the level of deliberate indifference. *Id.* at 7-8. This argument fails for several reasons.

As an initial matter, Defendants are wrong that either a "shocks the conscience" or a subjective deliberate indifference standard applies to Plaintiffs' claim for failure to provide prompt medical care. The Complaint alleges a conspiracy and joint action in violation of the Fourth Amendment between the Paramedic Defendants and the Officer Defendants, with the overt acts of the Paramedic Defendants being the failure to provide prompt medical care. *See* Compl. ¶ 69; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). Since Marcus was an arrestee, rather than a pretrial detainee or a convicted prisoner, the Fourth Amendment objective

reasonableness standard should apply to his claims against the Paramedic Defendants in the same way it applies to his claims against the Officer Defendants. *See Graham v. Connor*, 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."); *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) (allowing Fourth Amendment challenges to pretrial detention even beyond the start of legal process); *Estate of Perry v. Wenzel*, 872 F.3d 439, 452-453 (7th Cir. 2017) (holding that the governing standard for a claim of inadequate medical care prior to a probable cause determination is the Fourth Amendment's reasonableness standard).

However, even if the Court were to find that the Fourteenth Amendment applies, it would make no difference in terms of the standard because, pursuant to the Supreme Court's recent decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), objective reasonableness is the standard under either constitutional provision. In *Kingsley*, the Court held that a pretrial detainee bringing an excessive force claim did not need to prove that the defendant was subjectively aware that the amount of force being used was unreasonable. *Id.* at 2472-73. Rather, the plaintiff needed only to show that the defendant's conduct was objectively unreasonable. *Id.* The Court in *Kingsley* used broad language to convey its holding. Focusing on pretrial detainees generally, the Court explained that, to succeed, a pretrial detainee only needs to show that the government's actions were not "rationally related to a legitimate non punitive government purpose" or that the actions "appear excessive in relation to that purpose." *Id.* at 2473-74. Such language clearly signals that *Kingsley* is meant to apply to all pretrial detainees. This is why the Second, Seventh, Ninth and Tenth Circuits have concluded that claims regarding denial of medical care and

conditions of confinement brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective reasonableness inquiry identified in *Kingsley*. *See Darnell v. Pineiro*, 849 F.3d 17, 36 (2d Cir. 2017); *Miranda v. Cnty. of Lake*, 900 F.3d 335 (7th Cir. 2018); *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018); *Castro v. Cnty. of L.A.*, 833 F.3d 1060, 1071 (9th Cir. 2016); *Colbruno v. Kessler*, 2019 U.S. App. LEXIS 19768, at *10-11 (10th Cir. July 2, 2019). Although the Fourth Circuit has not yet considered whether *Kingsley* extends to medical care claims, to the extent this Court finds that the Fourteenth and not the Fourth Amendment applies here, it should follow the Supreme Court's reasoning in *Kingsley* and analyze the claims using the objective reasonableness standard. *See Griffith v. Franklin Cty.*, 2019 U.S. Dist. LEXIS 51191, at *10-15 (E.D. Ky. Mar. 27, 2019) (applying *Kingsley's* objective reasonableness standard to a pretrial detainee's denial of medical care case even though the Sixth Circuit has yet to consider the issue).[3] Under this standard, Plaintiffs must show that the Paramedic Defendants "recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety." *Bruno v. City of Schenectady*, 727 F. App'x 717, 720 (2d Cir. 2018).

Accepting as true all of factual allegations contained in the Complaint and drawing all reasonable inferences in favor of the Plaintiffs, the conduct of the Paramedic Defendants demonstrates a conscious disregard of a risk of serious harm that was substantially certain, a type

[3] Defendants assert that a shocks-the-conscience standard should apply, implying that it is an even higher standard than subjective deliberate indifference. But this argument misconstrues *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). In *Lewis*, the Court explained that deliberate indifference to the medical needs of a pretrial detainee is "egregious enough" to satisfy the "conscience-shocking" element required of a substantive due process claim. *Id.* at 849-50 (citing *City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244 (1983)). Thus, even if the Court were to find that *Kingsley's* objective reasonableness standard does not apply here, the standard should be, at most, subjective deliberate indifference, not an even higher "shocks the conscience" standard as Defendants imply.

of recklessness that easily meets not only the objective unreasonableness standard but also the higher standard of subjective deliberate indifference set forth in *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). As alleged in the Complaint, the Paramedic Defendants were dispatched to provide medical care to Marcus and to reduce, to the extent possible, the amount of danger he was in as a result of his mental health crisis. They witnessed the Officer Defendants take Marcus to the ground, roll him onto his stomach in the prone position, handcuff his hands behind his back and use extreme and unreasonable force to hogtie him with a restraint device, yet they failed to intervene to protect Marcus from being injured. They watched as Marcus was rendered unconscious by the police use of force, and they knew that Marcus had stopped breathing and was unresponsive, yet they chose to wait longer than two minutes before beginning any resuscitative efforts. There was nothing preventing the Paramedics from providing immediate care to Marcus on the street. Their subjective intent in not doing so, to the extent it is even relevant under the applicable standard, is a disputed factual matter that must be explored in discovery, but at this stage of the proceedings, Plaintiffs are entitled to the inference that in choosing to not provide immediate care, despite knowing that Marcus was not breathing, the Paramedics demonstrated that they knew that there was a substantial risk that Marcus would suffer serious harm and they consciously disregarded that risk. *See* Compl. ¶ 67 (specifically alleging that their conduct was "willful, malicious, oppressive and in reckless disregard" for Marcus's constitutional rights). *See, e.g., Odom v. S.C. Dep't of Corr.*, 349 F.3d 765, 770-71, 774 (4th Cir. 2003) (holding that plaintiff prisoner's uncontradicted evidence at+- summary judgment entitled him to the inference that defendants were aware of an excessive risk of harm to him and simply ignored it); *see also, e.g., Lemire v. California Dep't of Corr. and Rehabilitation*, 726 F.3d 1062, 1083 (9th Cir. 2013) ("While the failure to provide CPR to a prisoner in need does

not create an automatic basis for liability in all circumstances, a trier of fact could conclude that, looking at the full context of the situation, officers trained to administer CPR who nonetheless did not do so despite an obvious need demonstrated the deliberate indifference required for an Eighth Amendment claim."); *McRaven v. Sanders*, 577 F.3d 974, 983 (8th Cir. 2009) ("An officer trained in CPR, who fails to perform it on a prisoner manifestly in need of such assistance, is liable under § 1983 for deliberate indifference.").

Far from a "short pause," as Defendants would have it, a delay of more than two minutes in providing resuscitative care to someone who has stopped breathing will obviously cause serious harm and can prove fatal. A lay person, much less a trained and certified paramedic, understands that such an urgent medical need requires an immediate response, and the fact that the Paramedic Defendants eventually provided medical care to Marcus does not insulate them from liability. *See Walton v. Gomez (In re Estate of Booker)*, 745 F.3d 405 (10th Cir. 2014) (three-minute delay in seeking medical attention could support a Fourteenth Amendment violation); *Lewis v. Wallenstein*, 769 F.2d 1173, 1183 (7th Cir. 1985) (15-minute delay in treating inmate in cardiac arrest could support Eighth Amendment violation); *Bozeman v. Orum*, 422 F.3d 1265, 1273 (11th Cir. 2005) ("A delay in care for known unconsciousness brought on by asphyxiation is especially time-sensitive and must ordinarily be measured not in hours, but in a few minutes."); *McRaven*, 577 F.3d at 983 (8th Cir. 2009) (seven minute delay); *Bradich ex rel. Estate of Bradich v. City of Chicago*, 413 F.3d 688, 691-92 (7th Cir. 2005) (10-minute delay in summoning assistance for inmate who had hanged himself could support finding of deliberate indifference); *Tlamka v. Serrell*, 244 F.3d 628, 633-34 (8th Cir. 2001) (10-minute delay in providing CPR or any other form of assistance to unconscious inmate could support finding of deliberate indifference); *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) ("the factfinder may

conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.").

Moreover, the delay in care is made even more egregious by the fact that the Paramedic Defendants were acting jointly and in conspiracy with the Officer Defendants and were therefore responsible for the overt acts of placing Marcus in his vulnerable state by failing to intervene to protect Marcus when the Officer Defendants employed unnecessary force and hogtied Marcus while he was in a prone position, followed by the overt acts of failing to provide prompt medical care, actions "that could produce foreseeable, rapid, and deadly consequences." *See Walton*, 745 F.3d at 432.

For all these reasons, Plaintiffs' Complaint plausibly alleges sufficiently culpable conduct to state a claim for failure to provide prompt medical care.

II. The Paramedic Defendants Had a Constitutional Duty to Provide Prompt Medical Care Because the "Custody Exception" Applies

The Paramedic Defendants contend that Plaintiffs' claim for failure to provide prompt medical care should be dismissed because they had no constitutional duty to render medical aid since Marcus was not "in custody."[4] This argument does not withstand scrutiny.

In *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989), the Supreme Court held that the Constitution does not automatically require all state actors to provide competent medical assistance or rescue those in need. *DeShaney* discussed an exception to the general rule against state responsibility in the case of persons in custody: "[B]ecause the prisoner is unable by reason of the deprivation of his liberty to care for himself, it is only just that the State be required to care for him." *Id.* at 199. In so doing, the Supreme Court confirmed its previous decisions to this effect. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (finding

[4] The Paramedic Defendants concede that they are County employees acting under color of state law.

that states are required to provide adequate medical care to incarcerated prisoners, reasoning that "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself"); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (extending *Estelle* to patients involuntarily committed to mental institutions); *City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244 (1983) ("The Due Process Clause . . . require[s] the responsible government or governmental agency to provide medical care to persons . . . who have been injured while being apprehended by the police."). The Court explained that these cases stand for the proposition that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney,* 489 U.S. at 199-200; *see also Buffington v. Baltimore County*, 913 F.2d 113 (4th Cir. 1990). The rationale for this principle is that:

> when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises *not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf*. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf . . . which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interest against harms inflicted by other means.

Deshaney, 489 U.S. at 200 (emphasis added and citations omitted).

Clearly, then, under the plain reading of *DeShaney* and *City of Revere*, the Paramedic Defendants had a constitutional duty to provide medical care to Marcus because he was "in custody" and had been "injured while being apprehended by the police." Nevertheless, the Paramedic Defendants argue that because Marcus was not in their custody but rather in the custody of the Police Defendants, the Paramedic Defendants' inaction cannot be a constitutional

violation because they have no duty to intervene or provide medical care in this situation. In effect, the Paramedic Defendants argue that they can be present on a scene in their role as state actors watching other state actors cause the death of an individual and yet may stand by idle, because "it's not their job." *See Reddick v. Bloomingdale Police Officers*, 2001 U.S. Dist. LEXIS 9619, at *31 (N.D. Ill. July 11, 2001).

In *Ramirez v. City of Chi.*, 82 F. Supp. 2d 836 (N.D. Ill. 1999), the court soundly rejected this same argument, calling it "an argument of breathtaking cynicism." In *Ramirez*, the police were called to a bar where Omar Ramirez had been involved in a fight. He had been using drugs and acting wildly, jumping out of a window and fracturing his heel. The police handcuffed Ramirez behind his back, dropped him into the street face down while cuffed and assaulted him. When the defendant paramedics arrived they refused to treat Ramirez or transport him in their ambulance to a hospital with a trauma center. Instead, Ramirez was put on his belly in a squadrol and driven unsupervised to a hospital with no trauma center and died shortly after arrival. The court held that *DeShaney's* custody exception applied and reasoned as follows:

> The paramedics argue that because Mr. Ramirez was not in their custody but that of the Chicago Police Department, they did not "suddenly acquire a duty to treat a man who was not in their custody," an argument of breathtaking cynicism.
>
> I agree with the plaintiffs, however, that the paramedics, public employees who were dispatched specifically to aid Mr. Ramirez, "suddenly acquired" a constitutional obligation to aid him when the police defendants, also public employees, took him into custody on behalf of the City of Chicago, and he was injured in the process. Chicago Fire Department paramedics have a duty to aid persons who are injured while in custody of the Chicago Police, or indeed, the Cook County Sheriff or the Illinois State Police. State action cannot be diluted by being dispersed over several departments.
>
> The paramedics' argument makes no sense because the Police Department is the agency designated by the state to take persons into custody, while the Fire Department is designated with the responsibility, among other things, to provide medical care for persons in need. On the paramedics' argument, Chicago Fire Department employees can never have any constitutional duty to provide anyone in police custody with medical care. But the Supreme Court has said that due process "require[s] the responsible government or governmental agency to provide medical care to persons . . . who have been injured while being apprehended by the police." *City of Revere v. Mass. Gen'l Hosp.*, 463 U.S.

> 239, 244, 77 L. Ed. 2d 605, 103 S. Ct. 2979 (1985). The Fire Department and the employees tapped for the job therefore had a constitutional duty to provide Mr. Ramirez with medical care while in police custody.

Ramirez, 82 F. Supp. 2d at 839-40.

Likewise, here, the Paramedic Defendants, who were public employees dispatched specifically to aid Marcus, acquired a constitutional obligation to aid him when the Officer Defendants, also public employees, took him into custody on behalf of the City of Greensboro and he was injured in the process. *See City of Revere*, 463 U.S. at 244; *see also Reddick*, 2001 U.S. Dist. LEXIS 9619, at *27-36 (custody exception applied to firefighters and paramedics who watched and did nothing as the police and/or some of their own colleagues beat and choked the strapped-down plaintiff resulting in his death); *Cole v. City of Chi.*, 2008 U.S. Dist. LEXIS 92753, at *8-9 (N.D. Ill. Nov. 14, 2008) (custody exception applied to paramedics who failed to intervene to prevent the use of excessive force against the plaintiff who tried to leave and was physically prevented from doing so and then assaulted).

In *Salazar v. City of Chicago*, 940 F.2d 233 (7th Cir. 1991), the Seventh Circuit considered the liability of paramedics for failure to treat a man who was injured in a car accident before being taken into police custody, finding:

> Although the state has no general constitutional duty to provide rescue services, the government may not cut off all sources of private aid or self-help, and then decline to provide replacement services. If Salazar was in custody from the time the paramedics arrived-that is, if he was not free to seek other forms of assistance-then the paramedics might be liable for violating Salazar's right to due process by failing to treat his injuries.

Id. at 237 (citations omitted). Thus, "the Seventh Circuit expressly did not limit the liability of the paramedics to cases where persons were in *their* custody, but extended it to include persons who [were] in the custody of police *when the paramedics arrived*." *Ramirez*, 82 F. Supp. 2d at 840 (emphasis in original).

The Paramedic Defendants' reliance on the Sixth Circuit's decision in *Jackson v. Schultz*, 429 F.3d 586 (6th Cir. 2005), is misplaced. In *Jackson*, the decedent was shot by a fellow bar patron and died during an ambulance trip to the hospital, allegedly due to the defendant EMTs' failure to provide life support. The Court held that he was not in custody as that term was used in *DeShaney*, explaining that the EMTs:

> did not cause decedent to be shot nor did they render him unconscious. There is no allegation that the EMTs restrained or handcuffed the decedent. There is no allegation that the decedent was not free to leave the ambulance or be removed from the ambulance. Decedent's liberty was "constrained" by his incapacity, and his incapacity was in no way caused by the defendants.

Jackson v. Schultz, 429 F.3d at 591.

One key difference between *Jackson* and the present case is that there was no police involvement in *Jackson*; the decedent was injured by a man in a bar, not while being apprehended by the police, and the police were not involved whatsoever. Moreover, unlike *Jackson*, the allegations in Plaintiff's Complaint clearly support the conclusion that the Officer Defendants restrained Marcus's liberty and he was not free to leave. At that point, the Paramedic Defendants acquired a duty to intervene to prevent the use of excessive force and to provide medical care because the allegations in the Complaint support a conclusion that Marcus was in custody. *See Cole*, 2008 U.S. Dist. LEXIS 92753, at *11 (citing *Jackson*, 428 F.3d at 591 (state actors have a constitutional duty to intervene and provide adequate medical care to individuals who are in custody under *DeShaney*)).

III. The Paramedic Defendants are Not Entitled to Qualified Immunity

"While the defense of qualified immunity may be presented in a motion to dismiss, the defense faces a 'formidable hurdle' 'when asserted at this early stage in the proceedings . . . and 'is usually not successful.'" *Blackburn v. Town of Kernersville*, 2014 U.S. Dist. LEXIS 170386,

at *6 (M.D.N.C. Dec. 9, 2014) (quoting *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 396 (4th Cir. 2014)). The Paramedic Defendants' "argument" for qualified immunity consists of the following three sentences:

> The law is well settled that a public official or employee is entitled to qualified immunity for civil damages unless his conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Simmons v. Poe*, 47 F.3d 1370, 1385 (4th Cir. 1995) (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The instant complaint alleges that the Paramedics are Guilford County Public Employees. (ECF No. 1, p. 4, ¶¶ 19-20). The Paramedics should thus be entitled to qualified immunity here since they have been sued in their individual capacities but have failed to have engaged in any alleged "conduct that violates *clearly established constitutional rights* of which a reasonable person would have known." *Id.* (internal citation omitted and emphasis added); *see also Salih v. Smith*, No. 93-1556, 1994 U.S. Dist. LEXIS 19562 at *21-22 (D. Md. 1994) (qualified immunity is available as a defense against suit against public officials and employees in their individual capacity).

Def. Br. at 3-4. This argument should be deemed waived because it is conclusory, undeveloped and contains no legal analysis. *See Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 653 n.7 (4th Cir. 2006) ("the argument section of the Plaintiffs' brief contains a single sentence asserting that the district court 'erroneously determined that the statute of limitations barred the action.' Appellant's Br. at 12. This conclusory remark is insufficient to raise on appeal any merits-based challenge to the district court's ruling."); *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 396 n.* (4th Cir. 2014) (arguments that are perfunctory and undeveloped are deemed waived); *United States v. Harris*, 708 F. App'x 764, 765 n.2 (4th Cir. 2017) (same).

If the Court decides to consider the qualified immunity defense, it should be denied on the merits. To determine whether an officer is entitled to qualified immunity, courts engage in a two-step inquiry. "The first step is to determine whether the facts, taken in the light most favorable to the non-movant, establish that the officer violated a constitutional right." *Yates v. Terry*, 817 F.3d 877, 884 (4th Cir. 2016) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). "At the second step, courts determine whether that right was clearly established." *Id.* As set forth in

Sections I and II above, Plaintiffs have established that the Paramedic Defendants violated Marcus's constitutional right to prompt medical care whether that right accrues under the Fourth Amendment as an unreasonable seizure or under the Fourteenth Amendment. Therefore, the first step of the qualified immunity analysis has been satisfied.

Plaintiffs have also satisfied the second step of the qualified immunity analysis—whether the Paramedic Defendants' conduct violated a constitutional right that was clearly established at the time the conduct occurred. *Saucier*, 533 U.S. at 201. While the Supreme Court has warned that courts must not define "clearly established law at a high level of generality," it has also instructed that there need not be a case directly on point. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). To be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In this analysis, the Fourth Circuit reviews "cases of controlling authority in this jurisdiction, as well as the consensus of cases of persuasive authority from other jurisdictions." *Sims v. Labowitz*, 885 F.3d 254, 262 (4th Cir. 2018) (quoting *Amaechi v. West*, 237 F.3d 356, 363 (4th Cir. 2001)). The Fourth Circuit has repeatedly held that "a right need not be 'recognized by a court in a specific context before such right may be held 'clearly established' for purposes of qualified immunity.'" *Yates*, 817 F.3d at 887 (quoting *Meyers v. Baltimore Cty.*, 713 F.3d 723, 734 (4th Cir. 2013)); *see also Sims*, 885 F.3d at 262 ("We observe that the exact conduct at issue need not previously have been deemed unlawful for the law governing an officer's actions to be clearly established."). As the Fourth Circuit recently explained,

> Instead, we must determine whether pre-existing law makes "apparent" the unlawfulness of the officer's conduct. Accordingly, a constitutional right is clearly established for qualified immunity purposes not only when it has been specifically adjudicated but also

> when it is manifestly included within more general applications of the core constitutional principle invoked.

Sims, 885 F.3d at 263 (internal quotations and citations omitted).

The general standard of liability for failure to provide medical care has been clearly established since *Estelle v. Gamble*, 429 U.S. 97 (1976), *City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239 (1983), and *Farmer v. Brennan*, 511 U.S. 825 (1994); the standard has been applied to cases involving paramedics, *Reddick v. Bloomingdale Police Officers*, 2001 U.S. Dist. LEXIS 9619, at *27-36 (N.D. Ill. July 11, 2001); *Ramirez v. City of Chi.*, 82 F. Supp. 2d 836, 839-42 (N.D. Ill. 1999); *Cole v. City of Chi.*, 2008 U.S. Dist. LEXIS 92753, at *5 (N.D. Ill. Nov. 14, 2008); it has been applied to cases involving a delay in medical care, *Walton v. Gomez (In re Estate of Booker)*, 745 F.3d 405 (10th Cir. 2014); *Owensby v. City of Cincinnati*, 414 F.3d 596, 603 (6th Cir. 2005); *Lewis v. Wallenstein*, 769 F.2d 1173, 1183 (7th Cir. 1985); *Bozeman v. Orum*, 422 F.3d 1265, 1273 (11th Cir. 2005); *McRaven*, 577 F.3d at 983 (8th Cir. 2009); *Bradich ex rel. Estate of Bradich v. City of Chicago*, 413 F.3d 688, 691-92 (7th Cir. 2005;, *Tlamka v. Serrell*, 244 F.3d 628, 633-34 (8th Cir. 2001); and it has been applied to cases involving a failure to provide prompt resuscitative efforts, *Lemire v. California Dep't of Corr. and Rehabilitation*, 726 F.3d 1062, 1083 (9th Cir. 2013); *McRaven v. Sanders*, 577 F.3d 974, 983 (8th Cir. 2009).

Thus, the contours of the right are clearly established such that any reasonable paramedic in the Defendants' position (and with their training) would have known that failing to perform immediate resuscitative efforts on Marcus for longer than two minutes when he was unconscious and not breathing as a result of the Officer Defendants' use of force could violate the Constitution. Indeed, Plaintiffs are entitled to the inference at this stage that the Paramedics, in choosing not to provide immediate care despite knowing that Marcus was not breathing,

knowingly violated the law (*i.e.*, they knew that there was a substantial risk that Marcus would suffer serious harm and they consciously disregarded that risk). Accordingly, Plaintiffs have satisfied the clearly established prong.

IV. The Paramedic Defendants' Motion to Dismiss Plaintiffs' State Law Wrongful Death Claim and The County's Motion to Dismiss Plaintiffs' *Respondeat Superior* Claim Should Be Held in Abeyance Pending the Court's Ruling on Plaintiffs' Motion for Leave to File an Amended Complaint

Plaintiffs have filed simultaneous with this response brief a motion for leave to file an amended complaint that adds certain factual allegations that are limited to the Paramedic Defendants. As explained in the motion, Plaintiffs request that the Court apply the proposed amended complaint to the pending motions to dismiss but hold in abeyance the portions of the Paramedic and County motions that relate to the state law claims since the proposed amended complaint may render those arguments moot. If the Paramedics and County wish to pursue their current arguments or make new arguments concerning the state law claims in light of the amended complaint, Plaintiffs suggest that the Court consider ordering supplemental briefing.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court deny the Paramedic Defendants' motion to dismiss concerning Plaintiffs' federal claims and hold in abeyance pending the resolution of Plaintiffs' motion to amend their complaint the portions of the Paramedics and the County's motions that relate to the state law claims.

Dated: July 26, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

The undersigned hereby certifies that the foregoing document complies with Local Rule 7.3(d)'s limitation of no more than 6,250 words (excluding captions, signature lines, certificate of service and any cover page or index) as counted by word processing software.

Dated: July 26, 2019

/s/ Graham Holt
Graham Holt

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Graham Holt
Graham Holt