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**IN THE UNITED STATES DISTRICT COURT FOR  
THE MIDDLE DISTRICT OF PENNSYLVANIA**

Hope Amspacher, Administrator of the : CIVIL ACTION  
Estate of Zachary Kirchner, and Matthew : NO.: 1:23-cv-00286-CCC  
Kirchner :  
Plaintiffs :  
vs. :  
Officer Marc Greenly et al :  
Defendants :

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**BRIEF IN SUPPORT OF MOTION  
TO DISMISS AND MOTION TO SEVER**

**I. INTRODUCTION**

In this purported Civil Rights Action, plaintiff Matthew Kirchner claims that his federally protected rights were somehow deprived by Police Officer, Marc Greenly under the state related harm theory. However, the complaint fails to allege sufficient facts against Officer Marc Greenly to state a cause of action against him. Greenly is entitled to qualified immunity. In the alternative the matter against Greenly should be severed from the different claims, and different plaintiffs' claims.

**II. QUESTIONS PRESENTED**

SHOULD COUNT ONE OF PLAINTIFF'S AMENDED COMPLAINT BE DISMISSED WITH PREJUDICE BECAUSE PLAINTIFFS HAVE FAILED TO MEET THEIR PLEADING BURDEN AND HAVE OTHERWISE FAILED TO PROPERLY ALLEGE ANY ACTIONABLE CONDUCT ON THE PART OF OFFICER MARC GREENLY?

**SUGGESTED ANSWER: YES**

IN THE ALTERNATIVE, SHOULD COUNT ONE OF PLAINTIFF'S AMENDED COMPLAINT BE SEVERED FROM THE REST OF PLAINTIFF'S CAUSES OF ACTION?

**SUGGESTED ANSWER: YES**

### **III. STANDARD OF REVIEW**

#### A. Legal Standard

Rule 12(b)(6) provides that a Defendant may move to dismiss a Complaint for failure to state a claim upon which relief can be granted. When deciding whether to dismiss a claim pursuant to Rule 12(b) (6), the Movant is asking the Court to test the legal sufficiency of the complaint. Johnsrud v. Carter, 620 F.2d 29, 33 (3d Cir.1980) (citation omitted). While the Court must construe all material factual allegations in the Complaint in the light most favorable to the party opposing the Motion, the Court does not have to accept any factual conclusions or legal conclusion in the Complaint as true. Maio v. Aetna, Inc., et al., 221 F.3d. 472,

482 (3d Cir. 2000).

The plaintiff must "provide the grounds of his entitlement to relief," which "requires more than labels and conclusions." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964 (2007) (citations, alterations, and quotation marks omitted). A plaintiff must have, "...nudged his claim across the line from conceivable to plausible; or his complaint must be dismissed." Twombly, 127 S.Ct. at 1969. The factual allegations, "must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 127 S.Ct. at 1965 (citations omitted). "Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" Ashcroft v. Iqbal, 556 U.S. 662, 668, 129 S.Ct. 1937, 1949 (2009), citing Twombly, 127 S.Ct. 1955 (brackets omitted). "After Twombly, it is no longer sufficient to allege mere elements of a cause of action; instead 'a complaint must allege facts suggestive of [the proscribed] conduct.'" Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008), quoting Twombly, 127 S. Ct. at 1969 n. 8.

#### **IV. FACTUAL BACKGROUND**

In Plaintiff's Amended Complaint, it is alleged that Officer Greenly responded to a request to check on Zachary, after his mother was concerned that he

did not show up to school. (Plaintiff Amended Complaint Paragraph 102).<sup>1</sup>

Plaintiff alleges that Officer Greenly and Defendant Hoffman went to the house to check on Zachary, and brought Plaintiff, Matthew, with them. (Plaintiff Amended Complaint Paragraph 109). When Officer Greenly, Defendant Hoffman, and Plaintiff got to the house, they found Zachary deceased in the basement.

(Plaintiff's Amended Complaint Paragraph 119). Thereafter, Officer Greenly ran down the stairs, and carried Zachary's body up the stairs, and placed him on the kitchen floor. (Plaintiff's Amended Complaint Paragraph 121, 122).

## **V. ARGUMENT**

### **STATE CREATED DANGER THEORY**

Count One of Plaintiff's Amended Complaint must be dismissed because Plaintiff has failed to allege sufficient facts to show a state created danger. To prevail on a "state-created danger" theory, Plaintiffs must prove the following four elements:

- 1) the harm ultimately caused was foreseeable and fairly direct;
- 2) a state actor acted with a degree of culpability that shocks the conscience;
- 3) the plaintiff was a foreseeable victim, or a member of a discrete class of persons subjected to the potential harm brought about by the state's

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<sup>1</sup> Proper factual allegations in Plaintiff's Amended Complaint are taken as true for the purpose of this Motion only.

actions; and

4) a state actor affirmatively used his or her authority in a way that created a danger to the plaintiff or that rendered him more vulnerable to danger than had the state not acted at all.

Morrow v. Balaski, 719 F.3d at 177 (citing Bright v. Westmoreland Cnty., 443 F.3d 276, 281 (3d Cir.2006)). Est. of Viola v. Twp. of Bensalem, 96 F. Supp. 3d 466, 469 (E.D. Pa. 2015).

“[W]hat is required to meet the conscience-shocking level will depend upon the circumstances of each case, particularly the extent to which deliberation is possible.” Sanford v. Stiles, 456 F.3d 298, 310 (3d Cir.2006) “In cases where the alleged action was taken following deliberation...conscience-shocking behavior may be established if the defendant's actions displayed “deliberate indifference” to the plaintiff's safety. Id. Deliberate indifference, in turn, requires “conscious disregard of a substantial risk of serious harm.” Robinson v. Peirce, 586 Fed.Appx. 831 (3d Cir.2014) (internal quotations omitted) (citing Ziccardi v. City of Philadelphia, 288 F.3d 57, 66 (3d Cir.2002)). Est. of Viola v. Twp. of Bensalem, 96 F. Supp. 3d 466, 470 (E.D. Pa. 2015).

Plaintiff has failed to allege sufficient facts to show that Officer Greenly acted in a way that amounts to state created danger. To the contrary, Plaintiff was not rendered more vulnerable to danger than had the state not acted at all. Officer

Greenly and Defendant Hoffman went with Plaintiff, and after Plaintiff found his deceased brother “Officer Greenly carried Decedent’s lifeless body up the stairs and laid him on the kitchen floor.” (Plaintiff’s Amended Complaint Paragraph 122).

Very importantly, while there are allegations that the school district knew about the bullying of the decedent, and his mother’s concerns for his safety, there are no allegations anywhere in Plaintiff’s Amended Complaint that Officer Greenly had any knowledge whatsoever of these concerns. Therefore, Plaintiff has clearly not shown that Officer Greenly acted in a way that meets the conscience-shocking level.

#### QUALIFIED IMMUNITY

The Supreme Court held, in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” In Anderson v. Creighton, 483 U.S. 635, 640 (1987), the Court explained that to defeat immunity it is not sufficient that the right at issue be clearly established as a general matter. The question is whether a reasonable official could have believed his conduct was lawful in light of clearly established law and the information the official possessed. Id. at 483 U.S. at 641. “The

entitlement is an immunity from suit rather than a mere defense to liability; and ... it is effectively lost if a case is erroneously permitted to go to trial.” Mitchell v. Forsyth, 472 U.S. 511, 526 (1995).

In order to determine if an official’s conduct violates clearly established law, a Court must determine if at the time of the challenged conduct, “the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” Ford v. City of Harrisburg, 2018 U.S. LEXIS 180876 (MD PA 2018), quoting, Anderson v. Creighton, 483 U.S. 635, 640 (1987). When properly applied, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. Id. at 743.

Here, Plaintiffs have not plead anything which would overcome the qualified immunity of Officer Greenly. Plaintiff has not established that any of the Defendant’s official action was taken with any knowledge that they were violating Plaintiff’s rights, mainly since Plaintiff has failed to properly plead that there was a violation of Plaintiff’s rights. Plaintiff asserts that he was “deprived of his constitutionally protected right of right to be free from unjustified instruction upon Plaintiff’s physical and emotional well-being.” (Plaintiff’s Amended Complaint paragraph 135). Plaintiff states that this right was clearly established, but does not support that assertion with anything. Plaintiff never states where that right comes from, or what entitles Plaintiff to it. Additionally, Officer Greenly did not act in a

way that was unlawful. Plaintiff has failed to show that the alleged right that was violated was clear enough that Officer Greenly, and every reasonable official, under the alleged facts and circumstances would have understood that Officer Greenly's actions would violate the law. Plaintiff's allegations against Officer Greenly simply do not overcome his entitlement to Qualified Immunity.

### **MOTION TO SEVER**

While this Motion to Dismiss should be granted, and Officer Greenly should be dismissed from this matter, in the alternative, it is requested that this Court Sever Count I against Officer Greenly from the rest of Plaintiff's Amended Complaint.

Under Fed.R.Civ.P. 21: "Parties may be dropped or added by order of the Court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately." Whether severance is warranted requires balancing of several considerations, including "the convenience of the parties, avoidance of prejudice to either party, and promotion of the expeditious resolution of the litigation." German v. Federal Home Loan Mortgage Corp., 896 F.Supp. 1385, 1400 n. 6 (2d Cir.1995), citing Sutton Hill Assocs. v. Landes, Civ.A. No. 87-8452, 1988 WL 56710, at \*2 (S.D.N.Y. May 25, 1988) Off. Comm. of Unsecured Creditors v. Shapiro, 190 F.R.D. 352, 355 (E.D. Pa. 2000).

Plaintiffs have asserted seven counts against all defendants other than Officer Greenly. There are separate Plaintiffs in the matter, Amspacher and the estate of Zachary, who do not assert any actions against Officer Greenly. The bulk of this matter revolves around the actions of student Defendants which plaintiff alleges played a role in the decedent's decision to commit suicide. Plaintiff alleges that the student defendants bullied Plaintiff's decedent, and that they made fun of his suicide after the fact. The actions of the student Defendants have absolutely no bearing on Officer Greenly nor the claim against him. Other counts involved the school district's response or lack thereof to the alleged bullying.

Allowing the one Count against Officer Greenly to proceed together with the counts against the other Defendants would be highly prejudicial, and would not promote an expeditious resolution of the matter. The allegations against the Student Defendants and the allegations against Officer Greenly do not stem from the same facts or occurrences. Discovery on Count I does not in any way overlap the inquires which must be made in the remaining counts during discovery.

Accordingly, in the event that this Court does not grant Greenly's Motion to Dismiss, Count I against Greenly should be severed from the other counts in plaintiffs' complaint.

## **CONCLUSION**

Defendant, Officer Greenly, respectfully requests that this Honorable Court

grant his Motion to Dismiss, and dismiss him from this action with prejudice. In the alternative, Officer Greenly respectfully requests that Count One of Plaintiff's Amended Complaint against him be severed.

Respectfully Submitted,

SHERR LAW GROUP LLP

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