**UNITED STATES COURT OF APPEALS**

**FOR THE FOURTEENTH CIRCUIT**

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 )

Adnan SIDD, individually and on )

behalf of the Estate of Tanner )

Sidd, Deceased, )

Appellant, )

 )

v. ) No. ALB-16-01

 )

Will FRITZ, Gregory MACGILLRAY, )

Samuel BADCOOK, CITY OF HOMER, and )

HOMER CITY POLICE DEPARTMENT, )

 Appellees. )

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Before Lee, Gutierrez, and Urick, J.J.

Lee, J.

Appellant Adnan Sidd filed two claims under 42 U.S.C. § 1983 (2012) against Appellees Officer Will Fritz, Detective Gregory MacGillray, Homer City Police Chief Samuel Badcook, the City of Homer, and the Homer City Police Department, claiming violations of his First Amendment speech rights. Appellant Sidd, Executor of Tanner’s estate, also brought a claim against Appellee Fritz individually and on behalf of the estate of Tanner Sidd, Appellant’s deceased brother, alleging a violation of his and Tanner Sidd’s Fourteenth Amendment due process rights. The United States District Court for the District of Albers granted summary judgment for Appellees on both claims, dismissing Petitioner’s suit. Appellant appealed that decision to this Court.

For the reasons discussed below, this Court AFFIRMS the district court’s decision granting summary judgment for Appellees and dismissing Appellant’s suit.

**Facts and Proceedings Below**

The following facts are not in dispute. On the night of February 8 and early morning of February 9, 2015, Officer Will Fritz was working undercover in an unmarked police car in the Leakin Park parking lot; Leakin Park is a nightclub in the economically depressed Woodlawn neighborhood of Homer City, Albers. Officer Fritz was on patrol by himself. Despite its location, Leakin Park is the most popular club in Homer City and is famous for its lavish 80s and 90s-themed dance parties. Leakin Park is also known to be the headquarters of the largest and most dangerous gang in Homer City, the Serial Killaz. The Serial Killaz are notorious for perpetuating street violence, and for engaging in drug and firearm sales.

At approximately 12:30 a.m. on February 9, alleged high-ranking Serial Killaz members and newlyweds Jay Childress and Jenn Puxatawny exited Leakin Park, escorted by bouncer Don Fills. Childress was noticeably agitated and was angrily yelling at Puxatawny. According to Fills, Childress had been shouting that he wanted to go home for at least an hour before the couple left. Fills also stated that Childress and Puxatawny had been arguing over who should drive home that night. Childress demanded to drive, but Puxatawny refused, insisting that Childress had had too much to drink. February 8 was Childress’s birthday, and witnesses inside Leakin Park observed that he had been drinking a steady stream of scorpion bowls and pickleback shots throughout the evening. As a result, Childress had reportedly become increasingly belligerent as the night progressed. Puxatawny, on the other hand, only consumed two beers, having agreed to be the designated driver.

Puxatawny’s Cadillac Escalade was parked approximately twenty feet away from Officer Fritz’s unmarked police car. Recognizing Childress and Puxatawny as purported high-ranking members of the Serial Killaz, Officer Fritz watched the pair carefully as they walked to their car. As Childress and Puxatawny approached Puxatawny’s car, Puxatawny unzipped her handbag and retrieved her car keys. Childress lunged at Puxatawny and grabbed the keys from her hand. A struggle ensued, and Puxatawny dropped her open handbag to the ground. Officer Fritz observed a small, clear plastic baggie containing a white, powdery substance fall out of Puxatawny’s handbag and onto the ground. Believing this substance to be cocaine, Officer Fritz exited his police car and ordered Puxatawny to place her hands on the hood of the car, stating that she was under arrest.

Puxatawny initially resisted arrest, maintaining that the white powdery substance in the baggie was not cocaine but was instead crushed up breath mints. She pointed to Childress, telling Officer Fritz that her husband was heavily intoxicated and that “I need to get him home and put him in bed face-down.” During the course of Puxatawny’s arrest, Childress repeatedly stated, “I wanna go home. I wanna go home.” Officer Fritz admits that Childress was slurring his speech and that Childress’s breath smelled of alcohol. Officer Fritz also admits that Puxatawny did not appear to be intoxicated. Finally, Officer Fritz admits that when he interviewed Fills prior to leaving the scene, Fills told him that Childress had been drinking heavily and had been belligerent.

Pursuant to the arrest, Officer Fritz performed a pat down of Puxatawny’s person, which yielded another small baggie of a white, powdery substance in her left jacket pocket and a Glock 26 firearm in her waistband. Concerned for his own safety and the safety of other Leakin Park patrons, Officer Fritz completed the arrest, handcuffing Puxatawny and placing her in the backseat of his police car. He then conducted a pat down of Childress’s person, which yielded no contraband. Officer Fritz admits that he felt a wallet and a set of keys in Childress’s pocket, but did not seize them. Officer Fritz ordered Childress to sit on the ground while Officer Fritz secured the crime scene, and warned that failure to comply would result in Childress’s arrest. Childress did as he was told. Officer Fritz made written notes, recorded witnesses’ names and information, and collected Puxatawny’s handbag, the two small plastic baggies, and the Glock 26 for evidence.

At approximately 1:00 a.m., Childress asked Officer Fritz, “How am I supposed to get home if you’re arresting my wife? She’s my DD.” Officer Fritz responded, “That’s not my problem. Figure it out yourself.” Officer Fritz then drove away with Puxatawny. About five minutes later, Childress, who was still intoxicated and who still possessed Puxatawny’s car keys, got into Puxatawny’s Escalade and attempted to drive himself home on Route 202 north, a divided highway with a grassy median with gaps in some places to allow cars to make left turns.

Meanwhile, Appellant Adnan Sidd, then twenty-one years old, was riding in the front passenger seat of a Toyota Corolla driven by his older brother, Tanner Sidd, along Route 202 south. Neither brother had been drinking. At approximately 1:20 a.m., the SUV driven by Childress drifted across one of the highway’s turn lanes and crashed head on into Tanner Sidd’s Toyota Corolla. Forensic analysis of the scene indicated that when the crash occurred, Childress had been driving approximately 100 miles per hour, nearly twice the speed limit in that area. Childress was knocked unconscious, but was otherwise uninjured. Adnan Sidd suffered serious but not life-threatening injuries in the crash; he had a collapsed lung, several bruised ribs, and a concussion. Tanner, however, sustained severe spinal cord and brain injuries and fell into a coma; he died three days later.

 Tanner Sidd’s death was traumatic for Adnan Sidd. As a result of Tanner’s death, Adnan Sidd became depressed and began to exhibit symptoms of post-traumatic stress disorder, including trouble sleeping, extreme mood swings and episodes of anger, nightmares, and memory issues. For months, he barely ate or slept and he rarely left his house; he lost his job. He repeatedly called the Homer City Police Department asking for updates on the case against Childress, telling them that he wanted “to see the driver who killed my brother and screwed up my life behind bars.”

 Detective Gregory MacGillray investigated the accident. Childress was initially charged with driving under the influence (“DUI”) and with vehicular manslaughter, but MacGillray recommended that the police drop the vehicular manslaughter charge. Childress pled guilty to the DUI charge; his license was suspended and he was ordered to complete 150 hours of community service. On March 26, 2015, Adnan Sidd learned that Childress would not serve any prison time; he immediately called the police station and asked to speak to the Chief of Police, Samuel Badcook. Sidd told Badcook “I can’t believe you didn’t throw that guy in prison for killing my brother! There’s no justice for Muslims like me; cops don’t care about our community.”

After learning that Childress would not be charged with manslaughter, Adnan reached out to his friend and local activist Rabia Chowdhury. Police and community relations in Homer City had significantly deteriorated in recent years, especially between the police and the Muslim community. Muslim residents of Homer City have reported incidents of police harassment and of police failure to respond to or properly investigate crimes against members of the Muslim community. Adnan has stated that he believes that the decision to charge Childress with a DUI and not with vehicular manslaughter reflects the negative relationship that Homer City police have with the Muslim community. Although the Homer City Police Department officially maintains that they are working to improve relations with the Muslim community, the department does not dispute that police have failed to investigate many reports of harassment.

 Adnan told Rabia he wanted to expose the Homer City Police Department’s handling of the charges against Childress, “to get justice for Tanner.” Rabia agreed to help investigate the department and to organize a campaign to bring attention to the police department’s alleged mishandling of the Childress prosecution. Adnan began writing weekly letters to Police Chief Badcook to complain about the department’s discriminatory treatment of Muslims. Through her investigation, Rabia discovered that Officer Fritz had arrested Puxatawny just prior to the car crash and that the SUV Childress was driving when he crashed was Puxatawny’s.

Rabia conveyed this information to Adnan, and Adnan filed a formal complaint against Detective MacGillray and Officer Fritz, alleging discrimination and general incompetence in their handling of Childress. Adnan spoke to several local news outlets about the accident and the DUI charge against Childress; those outlets began to report not just on Adnan’s claim, but on other claims of discriminatory handling of crimes involving Muslims. In several interviews which aired on the evening news in April 2015, Adnan stated that he believed that the police were ignoring clear evidence sufficient to charge Childress with vehicular manslaughter because they do not care about the Muslim residents of Homer City. In one such interview, which aired on April 21, 2015, Adnan became visibly enraged with a reporter who expressed skepticism toward Adnan’s suggestion that the department intentionally failed to charge Childress with vehicular manslaughter. Adnan appears to shove the reporter. He then apologized, stating “I’m still dealing with my PTSD and sometimes I can’t control my emotions.”

 On April 27, 2015, Adnan and Rabia organized a formal protest outside the police station; Rabia alerted the local media. Approximately fifty people attended the protest; they held signs and picketed on the public sidewalk in front of the police station.[[1]](#footnote-1) Adnan had a bullhorn and was leading the protestors in a call-and-response chant: “What do we want?”, “Better police!” “When do we want it?”, “Now!”Adnan also held a sign that said “Officer Fritz: Tanner’s death is on your hands. Detective MacGillray: No justice for Tanner.”

Detective MacGillray, Officer Fritz, and two other officers arrived at the police station at approximately 10:30 a.m., about one hour after the protest began. Detective MacGillray and Officer Fritz have each stated that they were aware that Adnan had filed formal complaints against them and that he had been talking to the media about the Homer City Police Department. They both recognized Adnan as they walked toward the station doors. When the group of officers was about fifteen feet from the station’s entrance, Detective MacGillray was struck in the back by a small but hard object. He looked down and saw a small rock, about an inch in diameter. Officer Fritz stated that he had been looking at the protestors and that he saw Adnan raise his hand and make a forward motion, which he believed was a throwing motion, just before Detective MacGillray was struck. MacGillray stated he did not see who threw the rock, but that he turned around and saw Adnan’s arm lowering, and that Adnan was “staring right at me, and he looked angry.” Fritz said “I think it was that Adnan kid,” and MacGillray said, “Me too, let’s go talk to him.” The two other officers told MacGillray and Fritz that they thought the rock had come from somewhere else, but did not say anything further or stop Fritz and MacGillray when the two moved to confront Adnan.

Officer Fritz and Detective MacGillray have stated that they were both aware of Adnan’s recent outburst during the April 21 interview. MacGillray and Fritz ran up to Adnan and asked him if he had thrown the rock at MacGillray. Instead of answering, Adnan kept shouting into the bullhorn and continuing the protest chant. Frustrated at Adnan’s continued chanting, they asked him to put down the bullhorn. Adnan threw the bullhorn to the ground and began yelling directly at Fritz and MacGillray, shouting “This is all your fault! You are supposed to protect everyone, but you don’t care!” He was shaking his fists at the officers. Fritz and MacGillray became visibly frustrated with Adnan, and placed Adnan under arrest for assault and battery on an officer. Fritz and MacGillray have maintained throughout litigation that they objectively believed at the time that Adnan threw the rock.

Although he maintained his innocence, police held Adnan for over twenty hours. The entire incident was filmed by a local news crew; on the morning of April 28, the cameraman from that crew turned over footage of the incident, which clearly showed that a protestor standing behind Adnan, and not Adnan, had thrown the rock. Adnan was released; no charges were filed.

On June 17, 2015, Adnan Sidd filed a complaint in the United States District Court for the District of Albers under 42 U.S.C. § 1983 against Officer Will Fritz, Detective Gregory MacGillray, Homer City Police Chief Samuel Badcook, the City of Homer, and the Homer City Police Department. Appellant Sidd alleged that Appellees MacGillray and Fritz arrested him in retaliation for the exercise of his First Amendment rights. Appellant also alleged, under a state-created danger theory of liability, that Appellee Fritz’s actions on the night Fritz arrested Puxatawny caused the harm Appellant suffered when Childress crashed into Tanner Sidd’s car, violating Tanner and Adnan’s Fourteenth Amendment due process rights.

Appellees moved for summary judgment on both claims. Section 1983 imposes liability on a state official who “under color of state law subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution.” 42 U.S.C. § 1983. State officials are immune from suit, however, unless the plaintiff can show that the state official violated a constitutional right and that the right was clearly established at the time of the violation. Pearson v. Callahan, 555 U.S. 223, 243-44 (2009). Appellees did not raise a qualified immunity defense to either claim; that defense is waived. Appellees argued, however, that because Appellant and Appellees agree that MacGillray and Fritz had probable cause to arrest Appellant, the court should dismiss Appellant’s First Amendment claim. Appellee Fritz also argued that because Appellant could not prove that Fritz’s conduct “shocked the conscience” or that Fritz knew that his actions could foreseeably cause the harm to Appellant, the court should dismiss the Fourteenth Amendment claim.

On the First Amendment claim, the district court agreed with Appellees that establishing a lack of probable cause is a required element of a plaintiff’s prima facie First Amendment retaliatory arrest claim. Because Appellant concedes that police had probable cause for his arrest, the district court granted summary judgment for Appellees on the First Amendment claim. The district court also granted summary judgment for Appellee Fritz on the Fourteenth Amendment claim. In so holding, the district court adopted Appellee Fritz’s proffered test for determining whether liability can attach under a state-created danger theory. Applying that test, the district court found that Appellee Fritz’s actions did not meet the required level of culpability and did not foreseeably cause the harm to Appellant. Appellant has timely appealed both decisions to this Court.

**Standard of Review**

This Court will review the district court’s grant of summary judgment de novo, “construing all facts and reasonable inferences in the light most favorable to the non-moving party.” Thayer v. Chiczewski, 705 F.3d 237, 246 (7th Cir. 2012). “Summary judgment is appropriate only if ‘the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” Id. (quoting Fed. R. Civ. P. 56(a)).

**Discussion**

 First Amendment Retaliatory Arrest Claim

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or . . . the right of the people . . . to petition the government for a redress of grievances.” U.S. Const. Amend. I. The First Amendment prohibits government officials from retaliating against an individual for exercising her First Amendment rights. Hartman v. Moore, 547 U.S. 250, 256 (2006). This prohibition protects “a significant amount of verbal criticism and challenge directed at police officers.” City of Houston v. Hill, 482 U.S. 451, 461 (1987).

The Supreme Court has established a framework to determine when an official is liable for retaliation against an individual who has engaged in constitutionally protected activity. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). The Mt. Healthy framework requires a plaintiff alleging a First Amendment retaliation claim to show that: (1) he engaged in activity protected by the First Amendment; (2) he suffered an injury that would chill an ordinary person from continuing to engage in the protected activity; and (3) the exercise of that right was a “substantial” motivating factor in the officer’s decision to retaliate. Id. If a plaintiff can prove these elements, the burden shifts to the officer to prove that he would have taken the same action even in the absence of plaintiff’s protected conduct. Id. Appellees concede that Appellant was engaging in protected speech. Further, the parties do not dispute that Appellant’s arrest was an injury that would chill an ordinary person from speaking. The only issue is whether Appellant can satisfy the third prong, given that Appellees had probable cause to arrest him.

In 2006, this Court modified the Mt. Healthy framework, holding that a plaintiff had to establish a lack of probable cause to establish a prima facie case of retaliatory prosecution. Hartman v. Moore, 547 U.S. 250, 265-66 (2006). The Hartman Court highlighted three factors to support this “no-probable-cause” requirement. First, the Court emphasized that a retaliatory prosecution claim usually requires plaintiff to prove a complex chain of causation. Id. at 259. Second, the Court observed that the presence, or absence, of probable cause is highly probative of whether “retaliation was the but-for basis for instigating the prosecution.” Id. at 261. The Court also found that because probable cause will be litigated “in practically all” retaliatory prosecution cases, requiring the plaintiff to address it as part of her prima facie case would add little additional burden. Id. at 265. Finally, the Court noted the presumption of prosecutorial regularity in prosecutorial decisions. Id. at 263, 265.

Although Hartman modified the Mt. Healthy framework with regard to retaliatory prosecution claims, it did not address whether this modified framework applies to retaliatory arrest claims. In Reichle v. Howards, the Supreme Court considered a retaliatory arrest claim; the case considered whether Secret Service agents should receive qualified immunity after arresting the plaintiff for making critical comments about the Vice President’s policy. 132 S. Ct. 2088, 2091-92 (2012).The Court granted certiorari on two questions: “Whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest, and whether clearly established law at the time of Howards’ arrest so held.” Id. at 2093. Despite granting certiorari on the question, the Court declined to decide whether citizens have a First Amendment “right to be free from a retaliatory arrest that is otherwise supported by probable cause.” Id. at 2094. Instead, the Court held that the right, if it does exist, was not clearly established at the time of plaintiff’s arrest, and therefore, the officers were entitled to qualified immunity. Id. at 2097.

Our sister circuits are divided on the question of whether there is a First Amendment right to be free from government retaliation even when there is probable cause for the speaker’s arrest. Some courts have expanded Hartman to apply to retaliatory arrest claims or had a no-probable-cause requirement prior to Hartman, while others continue to apply Mt. Healthy. Among the courts that have expanded Hartman, some apply Hartman’s no-probable-cause requirement as a blanket requirement for any retaliatory arrest claim. Others appear to apply Hartman only when the case involves complex causation.

The Eighth Circuit, relying heavily on the Sixth Circuit’s decision in Barnes v. Wright, has held that Hartman applies “even where intervening actions by a prosecutor are not present.” See Williams v. City of Carl Junction, 480 F.3d 871, 876 (8th Cir. 2007) (citing Barnes v. Wright, 449 F.3d 709, 720 (6th Cir. 2006)). The Eighth Circuit is the only court to consider the impact of Reichle on its prior decisions, holding that Reichle leaves those decisions intact and reiterating that probable cause is fatal to any retaliatory arrest claim. Galarnyk v. Fraser, 687 F.3d 1070, 1076 (8th Cir. 2012).

Other circuits also require a plaintiff to prove a lack of probable cause to bring a retaliatory arrest claim. The Second and Eleventh Circuits have reaffirmed their pre-Hartman positions that probable cause is a complete bar to a First Amendment retaliation claim; neither court discussed Hartman’s impact, however. Golodner v. City of New London, 443 F. App’x 622, 624 (2d Cir. 2011); Phillips v. Irvin, 222 F. App’x 928, 929 (11th Cir. 2007). The Fifth Circuit has not revisited the issue since 2002, when it held that the presence of probable cause would entitle officers to qualified immunity in a retaliatory arrest case. Keenan, 290 F.3d at 261-62.

Some courts continue to apply the Mt. Healthy framework to retaliatory arrest claims. Even after Reichle and Hartman, the Ninth Circuit continued to hold that an individual has a right “to be free from police action motivated by retaliatory animus [even when] there [is] probable cause.” Ford v. City of Yakima, 706 F.3d 1188, 1193 (9th Cir. 2013). See also Wilson v. Vill. of Los Lunas, 572 F. App’x 635, 642-43 (10th Cir. 2014).

Appellant contends that Reichle supports permitting a retaliatory arrest claim to proceed in the face of probable cause. Appellant relies on Justice Ginsberg’s concurrence in Reichle, which states that Hartman is inapplicable to the typical retaliatory arrest case, because “there is no gap to bridge between one government official’s animus and a second government official’s action.” Id. at 2097 (Ginsberg, J. concurring). Appellant seeks to distinguish Hartman by arguing that unlike in retaliatory arrest claims, “the need to prove a chain of causation from animus to injury” present in retaliatory prosecution claims “provides the strongest justification for the no-probable-cause requirement.” Hartman, 547 U.S. at 259.

We are not persuaded; instead, we agree with the district court that Hartman logically extends to retaliatory arrest cases because they present similar concerns to retaliatory prosecution cases. Hartman held that the no-probable-cause requirement applies to all retaliatory prosecution cases, not just to retaliatory prosecution cases that present complex causation issues. 547 U.S. at 265-66. Thus, Hartman’s rule should extend to all retaliatory arrest cases, even absent complex causation.

Appellant also asserts that because an arresting officer usually can show probable cause, probable cause is less likely to serve as strong evidence of a legitimate motive in a retaliatory arrest case. See id. at 266-67 (Ginsberg, J., dissenting). Appellant admits that probable cause carries significant weight in a retaliatory prosecution because its existence suggests “that prosecution would have occurred even without a retaliatory motive.” Id. at 261. He argues, however, that although the presence of probable cause may demonstrate that an arrest was justified, it does not show that the officer would have taken the same action even in the absence of the protected conduct. See Gullick v. Ott, 517 F. Supp. 2d 1063, 1072 (W.D. Wis. 2007).

We find, however, that probable cause defeats a showing of “but-for” causation in a retaliatory arrest claim because probable cause indicates that the officer would have arrested the plaintiff regardless of any animus. When an officer has probable cause to make an arrest, he can make that arrest without offending the Constitution. See Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001). The district court held that Atwater’s logic extends to First Amendment cases, and we hold the same.

Finally, Appellant cautions that that extending Hartman to retaliatory arrest claims provides a way for retaliating officers to shield themselves from liability. See Hartman, 547 U.S. at 267 (Ginsberg, J., dissenting). He warns that “unethical officers” could “target their enemies or critics with a litany of citations for petty violations that would be ignored if committed by anyone else.” Gullick, 517 F. Supp. 2d at 1069. Although such a result is certainly not desirable, we find such a result is unlikely. Indeed, allowing First Amendment retaliatory arrest claims to move forward even when probable cause exists “would allow numerous plaintiffs to bring Fourth Amendment claims that would otherwise be dismissed by relabeling them as First Amendment retaliation claims.” Baldauf v. Davidson, No. 1:04-cv-1571-JDT-TAB, 2007 WL 2156065, at \*4 (S.D. Ind. Jul. 24, 2007). We are therefore not persuaded by these policy concerns.

For these reasons, this Court AFFIRMS the district court’s order granting summary judgment in favor of Appellees and dismissing Appellant’s claim.

 Fourteenth Amendment State-Created Danger Claim

The Due Process Clause of the Fourteenth Amendment prohibits state officials from depriving “any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV. The Due Process Clause seeks to prevent the government “from abusing [its] power, or employing it as an instrument of oppression.” Davidson v. Cannon, 474 U.S. 344, 348 (1986). Due process requirements are designed to “protect the people from the State, not to ensure that the State protect[s] them from each other.” DeShaney v. Winnebago Cty. Dept. of Soc. Servs., 489 U.S. 189, 196 (1989). Generally, individuals do not have an “affirmative right to governmental aid.” Id. An affirmative constitutional duty to protect an individual may arise, however, when the state takes custody of that individual and deprives him of a life, liberty, or property interest. Id.; see, e.g., Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (holding that the government has a duty to provide safe conditions to involuntarily committed mental patients); Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) (finding that the government has a duty to provide medical care to prisoners in its custody).

 The law is less clear in situations where the state does not have custody over the individual or has not directly caused harm to the individual. In DeShaney, the Supreme Court held that state officials generally have no duty to protect an individual from harm inflicted by a private actor. 489 U.S. at 197. Thus, DeShaney held that state social services officials did not violate the due process clause when they failed to protect four-year-old Joshua DeShaney from his father’s severe beatings, even though the officials knew or should have known of the abuse. Id. The Court emphasized that although the state may have been aware that Joshua faced dangers, “it played no part in their creation, nor did it do anything to render him any more vulnerable to them.” Id. at 201. Instead, when the state returned Joshua to his father, “it placed him in no worse position than that in which he would have been had it not acted at all.” Id.

DeShaney did not, however, declare that state officials are always immune from liability for harm caused to individuals by private actors. DeShaney dicta suggests two exceptions that can give rise to a duty to protect: (1) where the government takes the individual into custody and holds him against his will (the “special relationship” exception, not at issue in this case), and (2) where the government itself has created or increased the danger to the individual. Id. at 200-01. Prior to DeShaney, some lower courts had already grappled with the latter exception, now known as the “state-created danger” theory. As Judge Posner famously wrote: “If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.” Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

Since the Court decided DeShaney, each circuit has, at a minimum, discussed the state-created danger theory. Courts agree that the state official must affirmatively act for a duty to arise. Erwin Chemerinsky, Government Duty to Protect: Post-DeShaney Developments, 19 Touro Law Rev. 679, 690-91 (2003). Here, the parties agree that Appellee Fritz engaged in an affirmative act.

Consistency among the lower courts ends there, however. Though every circuit court of appeals has discussed the state-created danger theory, some have been reluctant to adopt it. See, e.g., Doe v. Covington Cty. Sch. Dist., 675 F.3d 849, 866 (5th Cir. 2012); Rivera v. Rhode Island, 402 F.3d 27, 35, 38 (1st Cir. 2005). The Fourth Circuit had previously rejected the state-created danger theory, but recently appeared to reconsider that position. Compare Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995), with Doe v. Rosa, 795 F.3d 429 (4th Cir. 2015). Whether the state-created danger theory is a valid theory of liability is an open question in this jurisdiction.

Section 1983 imposes liability on a state official who “subjects, or causes to be subjected,” an individual to the deprivation of constitutional rights. 42 U.S.C. § 1983. Appellant contends that this “causes to be subjected” language indicates that an officer need not directly cause harm for liability to arise. See Arnold v. Int’l Bus. Machines Corp., 637 F.2d 1350, 1355 (9th Cir. 1981). Although the state-created danger theory arises from dicta in DeShaney, most of our sister circuits have accepted the theory, some of them even prior to and without relying on DeShaney. See, e.g., Butera v. District of Columbia, 235 F.3d 637, 651-52 (D.C. Cir. 2001). We join those courts today.

Even among the circuits that recognize the state-created danger theory, however, approaches vary. See id. at 653 (explaining that there is “little consistency” in courts’ treatment of the state-created danger theory). No two circuits seem to have adopted the same test. Generally, however, a plaintiff bringing a state-created danger claim must always prove three elements: (1) a government action (2) that created a foreseeable risk of harm to the plaintiff (3) where the government actor had the requisite level of culpability. See Chemerinsky, supra, at 690-91; see also Gray v. Univ. of Colo. Hosp. Auth., 672 F.3d 909, 922 (10th Cir. 2012). The parties agree that Appellant must prove and had proved the first element, an affirmative government action, as part of his prima facie case. They disagree, however, over the other elements.

 As to the third element, the requisite level of culpability, mere negligence or gross negligence is not sufficient to demonstrate liability. See, e.g., Estate of Johnson v. Weber, 785 F.3d 267, 272 (8th Cir. 2015). Some courts, however, ask whether the state official acted with “deliberate indifference,” while others ask whether the official’s conduct “shocks the conscience.” Compare Henry A. v. Willden, 678 F.3d 991, 1002 (9th Cir. 2012), with Christiansen v. City of Tulsa, 332 F.3d 1270, 1281 (10th Cir. 2003).

Appellant urges this Court to adopt a deliberate indifference standard, which the district court rejected. Deliberate indifference is exemplified in the case of Wood v. Ostrander, in which a defendant trooper arrested a drunk driver and impounded the driver’s car at 2:30 a.m., leaving the car’s female passenger alone on the side of the road in a high-crime area. 879 F.2d 583, 586 (9th Cir. 1989). Subsequently, she accepted a ride with an unknown motorist, who raped her. Id. The Ninth Circuit ruled in favor of the passenger, finding that the defendant created the danger to her and acted with deliberate indifference as to her personal security. Id. at 588.

Appellee Fritz argues in favor of, and the district court adopted, a culpability requirement of intent that “shocks the conscience.” Under a “shocks the conscience” standard, a plaintiff’s claim must be “predicated on reckless or intentionally injury-causing state action which ‘shocks the conscience.’” Uhlrig v. Harder, 64 F.3d 567, 573 (10th Cir. 1995). In Uhlrig, the plaintiff sued state mental health administrators for the death of his wife, a therapist at a state hospital. Id. at 569. The defendants had decided to eliminate a special unit in the hospital; as a result, a dangerous patient was placed into the general hospital population, where he attacked and killed the plaintiff’s wife. Id. at 571. The Tenth Circuit found that the defendants’ actions did not “shock the conscience,” because the defendants did not “abuse their power or act in an arbitrary and oppressive manner,” and did not intend to injure the plaintiff’s wife. Id. at 575.

Appellant contends that the lower deliberate indifference standard is appropriate because deliberate indifference sets a threshold high enough to protect state officials from liability for conduct that does not offend the Constitution. See Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 206 (5th Cir. 1994). He points out that proving deliberate indifference requires proving a state official’s subjective knowledge, which differs from mere negligence. See Farmer v. Brennan, 511 U.S. 825, 828 (1994); McClendon v. City of Columbia, 305 F.3d 314, 326 n.8 (5th Cir. 2002). Finally, Appellant argues that in non-emergency situations, where state officials have an opportunity to reflect before acting, deliberate indifference remains the appropriate standard of culpability. Cty. of Sacramento v. Lewis, 523 U.S. 833, 851 (1998).

We agree with the district court, however, and hold that the proper culpability standard in any substantive due process claim is not mere deliberate indifference, but conduct that “shock[s] the conscience of federal judges.” Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992). The Court has stated that “only the most egregious official conduct can be said to be ‘arbitrary in the constitutional sense.’” Lewis, 523 U.S. at 848-49 (quoting Collins, 503 U.S. at 129). We find compelling the district court’s concern that relaxing the requirements to bring a state-created danger claim may deter government officials from taking risks and performing their duties.

Thus, a plaintiff must allege “conscience-shocking” behavior to bring a claim under a state-created danger theory of liability, and that a “conscience-shocking level” is that which is “intended to injure in some way unjustifiable by any government interest.” Id. at 848. Thus, to satisfy the “shocks the conscience” standard, the government must first have acted with “wrongful intent.” Uhlrig, 64 F.3d at 573-74. Wrongful intent requires either “an intent to harm” or “an intent to place a person unreasonably at risk of harm.” Id. Appellant concedes that he failed to show that Appellee Fritz acted with intent to harm and therefore, he failed to satisfy the “conscience-shocking” standard the district court adopted. Thus, his claim must fail.

As to the second element, causation and foreseeability, some courts merely require plaintiffs to show but-for causation and foreseeability of harm. See Willden, 678 F.3d at 1002; Reed v. Gardner, 986 F.3d 1122, 1126 (7th Cir. 1993). Other courts, however, demand a stricter causation and foreseeability showing; these courts require the plaintiff to show that he was part of a “limited and specifically identifiable group” and that the state official’s action placed him at “substantial risk of serious, immediate, and proximate harm.” Christiansen, 332 F.3d at 1281; see also Covington Cty. Sch. Dist., 675 F.3d at 865.

Appellant contends that as to foreseeability of harm, the focus should be on whether the danger created could foreseeably harm another person, not whether a specific individual is a foreseeable victim. Reed, 986 F.2d at 1127. Appellant argues that as in Reed, Appellee Fritz created an obvious danger by removing a sober designated driver from a car and leaving an obviously intoxicated passenger with the keys. Id. Moreover, Appellant contends that requiring a plaintiff to prove but-for causation already appropriately limits liability, and that courts should not focus on when the harm occurs or actions the plaintiff might have taken to avoid harm, as long as the plaintiff can prove causation. See id. at 1126-27; Davis v. Brady, 143 F.3d 1021, 1026 (6th Cir. 1998).

We disagree. The state-created danger theory focuses on the risk and injury that an individual plaintiff faced. See Davis v. Fulton Cty., 90 F.3d 1346, 1351 (8th Cir. 1996). Thus, “the state must create a unique risk of harm to the plaintiff that is greater than the risk faced by the general public.” Id. Knowledge of immediate harm distinguishes constitutional claims from regular tort claims. Martinez v. California, 444 U.S. 277, 285 (1980). A state official’s awareness of “general deficiencies” does not amount to knowledge of an immediate danger to a victim’s safety. Covington Cty. Sch. Dist., 675 F.3d at 865-66. Mere foreseeability of a harm to the general public and simple but-for causation do not sufficiently limit liability to claims involving true constitutional violations. Therefore, we hold that the district court properly required Appellant to establish that Appellee Officer Fritz knew that his actions created a foreseeable risk of immediate harm to Appellant.

Therefore, because Appellant concedes that he cannot establish that Appellee Fritz’s conduct “shocked the conscience” or that Fritz knew that his conduct created a foreseeable risk of immediate harm to Appellant, we hold that the district court properly found that Appellant failed to make out a prima case.[[2]](#footnote-2)

For these reasons, the Court AFFIRMS the district court’s order granting summary judgment in favor of Appellees and dismissing Appellant’s claim.

**SUPREME COURT OF THE UNITED STATES**

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 )

Adnan SIDD, individually and on )

behalf of the Estate of Tanner )

Sidd, Deceased, )

Petitioner, )

 )

v. ) No. ALB-16-01

 )

Will FRITZ, Gregory MACGILLRAY, )

Samuel BADCOOK, CITY OF HOMER, and )

HOMER CITY POLICE DEPARTMENT, )

 Respondents. )

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ORDER GRANTING CERTIORARI

 This Court grants Petitioner Adnan Sidd’s Petition for Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit. The Court will consider all issues raised in the court below.

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S. Koenig, Clerk

January 19, 2016

1. Picketing on the sidewalk is legal in Homer City and does not require a permit. [↑](#footnote-ref-1)
2. Because this Court finds that the district court imposed the proper prima facie requirements on Appellant for bringing a claim under a state-created danger theory of liability, we need not decide how Appellant’s case might fair under the lower standards he has argued for. [↑](#footnote-ref-2)