APPENDIX INDEX

892 F.3d 681
United States Court of Appeals, Fifth Circuit

Landry ROUNTREE, Plaintiff-Appellant,
Troy DYSON; City of Beaumont, Defendants–Appellees.

No. 17-40443
FILED June 11, 2018

Opinion

JERRY E. SMITH, Circuit Judge.

Landry Rountree appeals the dismissal of his 42 U.S.C § 1983 and related state-law claims against the City of Beaumont and Beaumont Police Sergeant Troy Dyson. We affirm the judgment of dismissal.

Rountree owns a towing business and, for thirty years, participated in Beaumont's non-consent tow rotation. For an accident that disables a car, the responding police officer calls a company on the rotation list to clear the wreck. While **Rountree** was on the list, non-consent tows for the Beaumont Police Department made up roughly two-thirds of his annual income.

In December 2013, Beaumont Police Chief James Singletary revoked **Rountree**'s city-issued towing permit. The revocation was ostensibly based on a complaint by a competing tow company, which asserted—truthfully—that three of **Rountree**'s state-issued licenses had lapsed. But **Rountree** alleges that

Singletary, through one of his officers, persuaded the competitor to lodge the complaint. In response to the complaint, Singletary sent **Rountree** a suspension letter and revoked his permit for two years. **Rountree** unsuccessfully appealed the suspension to the City Council and Mayor.

Although **Rountree**'s complaint is less than clear on the point, he conceded, in his briefing before the district court, that a city permit is not required for all towing in Beaumont. Rather, "a permit is only required for certain tow jobs where police require the tow." In other words, the permit is part of the city's process for choosing which vendors it hires to tow wrecked cars.

In March 2014, one of **Rountree**'s customers called him to an accident. Because his permit remained suspended, **Rountree** could not tow the customer's vehicle. Instead of towing the wreck himself, **Rountree** called a permitted tow truck to assist. While **Rountree** was on the scene, Dyson arrived and ordered **Rountree** to leave. When **Rountree** refused, Dyson arrested him for violating a city ordinance that forbids a tow driver from stopping within one thousand feet of an accident without a valid tow-truck permit. The charge was eventually dismissed.

In January 2016, **Rountree** sued the city and Dyson in state court under § 1983 and related state law. The defendants removed. Following a round of motions to dismiss, the magistrate judge, acting as the district court by consent under 28 U.S.C. § 636(c), dismissed all of **Rountree**'s claims in a thorough opinion. This

appeal followed.

II.

Rountree contends that the district court erred in dismissing his claims against the city. He describes the dismissal as "*sua sponte*" because, although the city moved to dismiss and **Rountree** responded on the merits, **Rountree** amended his complaint while the city's motion was pending. That amendment, to **Rountree**, "nullified" the pending motion to dismiss. Therefore the court could not have done what it claimed to do—dismiss **Rountree**'s claims on motion by the city—and must have acted *sua sponte*.

Rountree is mistaken. As explained in a treatise, and reiterated by several district courts in this circuit, "defendants should not be required to file a new motion to dismiss simply because an amended pleading was introduced while their motion was pending."[6]Rather, "[i]f some of the defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to ***684** the amended pleading."[2] Accordingly, the court acted within its discretion when it considered the city's motion before dismissing the amended complaint.

Rountree's second theory is that the court should not

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[1] 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 1476 (3d ed. updated Apr. 2018)

[2] *Id.*; *see also* *Mire v. Bd. of Supervisors of La. State Univ.*, No. 15-6965, 2016 WL 4761561, at *2 (E.D. La. Sept. 13, 2016); *Davis v. Dallas Cty.*, 541 F.Supp.2d 844, 848 (N.D. Tex. 2008).

have dismissed **Rountree**'s class-of-one equal protection claim for suspension of his permit.[3] As noted, a city permit is not required for general, private tows; a permit is merely required to be on the city's non-consent tow list. Class-of-one claims are inapposite "to a local government's discretionary decision to include or not include a company on a non-consent tow list." *Integrity Collision Ctr. v. City of Fulshear*, 837 F.3d 581, 586 (5th Cir. 2016) (quotation marks omitted).

Though *Integrity* did not directly address the decision to *revoke* a tow driver's non-consent towing permit (thereby removing him from the list), its reasoning extends here. "[A] class-of-one equal-protection claim is unavailable in a public employment context," and "[t]hat conclusion logically applies as well to a local government's discretionary decision to include or not include a company on a non-consent tow list."[4] It "would be incompatible with the discretion inherent in

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[3] In recounting the facts underpinning this dispute, **Rountree** asserts that, in addition to the suspension, he was assessed fines, and he suggests that the city has failed to fine other tow companies for similar violations. But his legal argument focuses exclusively on the length of his suspension, and any contention concerning the fines is therefore forfeited. Even if **Rountree** had adequately briefed an equal protection challenge to the fines, the district court correctly concluded that the claim fails. *See Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 604, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008) ("[A]llowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action.").

[4] *Integrity*, 837 F.3d at 586 (quotation marks omitted). "A city is a consumer of towing companies' services when it contracts for non-consent tows." *Id.* at 587 n.3.

the challenged action" to "allow[ ] equal protection claims on such grounds."[5]

Employment decisions "involve discretionary decisionmaking based on a vast array of subjective, individualized assessments,"[6] so "a city's decision to purchase services from private companies for its non-consent tows" can include "factors that are not reasonably measurable, such as reputation, personal experience, and the particularities of how the city wishes to operate its non-consent tow program."[7] And, it would be incompatible to allow an equal protection claim on the ground that one person received a discretionary punishment and another did not,[8] "even if for no discernable or articulable reason." *Engquist*, 553 U.S. at 604, 128 S.Ct. 2146 (employing a hypothetical about the issuance of speeding tickets)[9].It thus makes sense to extend *Integrity* here. If a city ***685** has the discretion to choose from whom it contracts private services, then it must equally retain the discretion to choose when to terminate such relationship.

Alternatively, **Rountree**'s equal-protection claim

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[5] *Id.* at 586 (quotation marks omitted).

[6] *Id.* at 587 (quoting *Engquist*, 553 U.S. at 603, 128 S.Ct. 2146).

[7] *Id.*

[8] Beaumont vests the chief of police with the "sole discretion" to determine whether a substantial violation occurred. BEAUMONT, TEX., ORD. § 6.08.005(b).

[9] Of course, an allegation "bas[ed] o[n] race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns." *Engquist*, 553 U.S. at 604, 128 S.Ct. 2146; *accord Integrity*, 837 F.3d at 588 n.5. Nothing here should be read to suggest otherwise.

fails because he did not sufficiently allege that he has been treated differently from others similarly situated.[10] His complaint generally alleges that other similarly situated individuals were treated differently, but he points to no specific person or persons and provides no specifics as to their violations.[11] Though we take factual allegations as true at the Federal Rule of Civil Procedure 12(b)(6) stage, "[t]hreadbare recitals of the elements of a cause

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[10] A class-of-one equal-protection claim requires the plaintiff "show that (1) he or she was intentionally treated differently from others similarly situated and (2) there was no rational basis for the difference in treatment." *Lindquist v. City of Pasadena*, 669 F.3d 225, 233 (5th Cir. 2012) (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000)).

[11] **Rountree** generally purports that "when other companies had similar violations, nothing was done to address them." **Rountree** notes that Gregory Stanley, who filed the complaint against **Rountree**, let his storage lot license lapse and was not suspended. Stanley, however, is not an apt comparator, both because he had only one license lapse (not multiple like **Rountree**) and because he had no complaint filed against him. The police department is only required to investigate "complaints arising from reported violations." BEAUMONT, TEX., ORD. § 6.08.005(a). Thus, **Rountree** needed to point to other tow-truck operators who had license lapses *and* had complaints filed. *See Lindquist*, 669 F.3d at 234–35 (rejecting as equal comparators persons who were not implicated by the relevant ordinance); *Beeler v. Rounsavall*, 328 F.3d 813, 816–817 (5th Cir. 2003) (rejecting as an equal comparator someone who applied to *renew* permits where the plaintiff had applied for a *new* permit).
Additionally, **Rountree** was cited for a fourth violation wherein he "refused to allow Officer[s] ... to inspect records of vehicles towed at" his facility in compliance with Section 6.08.006(b)(3) of the City Ordinances. **Rountree** does not contend that any other driver had this additional violation of refusing to permit inspections as required by law. That additional violation could rationally account for any perceived disparities in treatment.

of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). An allegation that others are treated differently, without more, is merely a legal conclusion that we are not required to credit.[12] **Rountree**'s equal protection claim fails.

Finally, **Rountree** challenges the dismissal of his false-arrest claim against Dyson, who is "entitled to qualified immunity unless there was no actual probable cause for the arrest" and he was "objectively unreasonable in believing there was probable cause for the arrest." *Davidson v. City of Stafford*, 848 F.3d 384, 391 (5th Cir. 2017). Crucially, "[t]his probable cause may be for any crime and is not limited to the crime that the officers subjectively considered at the time they perform an arrest." *Id.* at 392.

Dyson cites Beaumont City Ordinance Section 6.08.006(a)(1), which provides, "All tow truck operators shall ... [o]bey all lawful orders given by any police officer and not in any manner interfere with any police officer in the performance of his/her duty." Violating that is a misdemeanor. *See* BEAUMONT, TEX. ORD. § 6.08.007(a). **Rountree** admits in his complaint that Dyson ordered him "to move ***686** his tow truck and leave the scene," but **Rountree** "declined to follow the sergeant's direction to leave the scene." In his briefing, **Rountree** does not discuss

[12] *In re Great Lakes Dredge & Dock Co.*, 624 F.3d 201, 210 (5th Cir. 2010) ("We do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.") (internal quotation marks omitted); *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

Section 6.08.006(a)(1) or make any argument that Dyson would have been objectively unreasonable in believing his order to be lawful. Accordingly, because **Rountree** did not obey Dyson's apparently lawful order, Dyson was not objectively unreasonable in believing that he had probable cause to arrest. **Rountree**'s false-arrest claim fails.[13]

The judgment of dismissal is AFFIRMED.

[13] *See* *Payne v. City of Olive Branch*, 130 Fed.Appx. 656, 662 (5th Cir. 2005) (per curiam) (dismissing unreasonable-search-and-seizure claim where officer reasonably could have believed that suspect failed to obey a police order).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LANDRY ROUNTREE	**§**	
	§	
Plaintiff,	**§**	
	§	
v.	**§**	**CIVIL ACTION NO.**
	§	**1:16-CV-26**
CITY OF BEAUMONT,	**§**	
TEXAS, AND SERGEANT	**§**	
TROY DYSON	**§**	
	§	
Defendants.	**§**	

MEMORANDUM ORDER ON MOTIONS TO DISMISS

This case is before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) and the consent of the parties for all matters, including trial and the entry of judgment. Now pending before the Court for the purposes of this order are the defendant City of Beaumont and Troy Dyson's

motions to dismiss (doc. #14, #25).

I. Background

On November 13, 2015, plaintiff Larry Rountree ("Rountree" or "Plaintiff") filed his Original Petition in the 60th Judicial District Court of Jefferson County, Texas, against defendants the City of Beaumont ("the City") and Sergeant Troy Dyson ("Dyson)(collectively, "Defendants"). *See Original Petition,* filed with *Petition for Removal* (doc. #1-4). The plaintiff's Original Petition asserts causes of action under 42 U.S.C. § 1983 for various violation of his civil rights, along with state law causes of action for false arrest, false imprisonment, and intentional infliction of emotional distress ("IIED"). *See Original Petition*, at p. 1.

As factual support for his claims, Rountree states that he is the owner of a towing business in Beaumont, Texas. His business has participated in the "rotation system" for non-consent tows for the Beaumont Police Department (BPD). He claims that in December 2013, his towing permit was revoked by the BPD Police Chief, James Singletary, for a two (2) year period due to a complaint filed against Plaintiff by Gregory Stanley, d./b/a Spanky's Wrecker Service ("Stanley"). *Id.* at p. 2. He contends that BPD, through Chief Singletary, caused him to lose approximately two-thirds of his annual income for two years because "one of more officers persuade[d] Gregory Stanley, d/b/a Spanky's Wrecker Service, to lodge a complaint against Rountree complaining about three of Rountree's state-issued licenses having lapsed." *Id.* at p. 3. He contends that at the same time, Stanley's state-issued storage lot license had also lapsed in 2013, but no one in BPD attempted to persuade anyone to lodge a complaint against Stanley.

Id. He avers that other companies had similar violations but nothing was done to address them and, therefore, he contends he was subjected to selective enforcement and a personal vendetta. *Id.*

Rountree next states that Chief Singletary served a suspension letter on him for four separate offenses resulting in Rountree's towing permit being suspended to be followed by a two year revocation based on the fact that Rountree had three offenses (the fourth offense was suspended by the prosecutor). *Id.* at 3-4. He appealed the suspensions/revocations "due to their vindictive and punitive nature", but the City Council and Mayor agreed with the Chief's decision. *Id.* at p. 4.

As background, Rountree claims that in 2010 or 2011 the City (through Officer Don Bracker, the wrecker inspector) provided towing ordinances to Rountree and all other city-permitted towing companies. Rountree was also provided a copy of a towing ordinance by the City Clerk. However, after his appeal hearing, Rountree discovered that these provided ordinances were incomplete and incorrect in that the copies provided to him were missing three paragraphs of the complete ordinances. *See id.*. at pp. 4-5. He contends that the missing paragraphs in the ordinances provided to him establish the fact that Chief Singletary erred in his application of the ordinance rules and that Singletary had no authority to revoke Rountree's permit for the two year period. *Id.* at p. 5. Rountree claims he has attempted to correct this by bringing the matter up at City Council meetings and through numerous petition for a rehearing, but to date no rehearing has been granted by the City. *Id.*

He also avers that "as further evidence of its

vendetta against Mr. Rountree, the Defendant City, through its legal department and reportedly at the direction of city attorney Tyrone E. Cooper, caused 390 municipal court summons to be filed against Mr. Rountree with fines totaling over 145,000 dollars." *Id.* He claims that this is an unprecedented action against any individual or towing company. *Id.*

Separately, Mr. Rountree contends that at around 11:30 a.m. on March 26, 2014, he was called to the scene of an accident by one of his customers. *Id.* at p. 7. He states that he could not tow his customer's vehicle due to the revocation of his city permit. *Id.* He called a permitted tow truck to service his customer. *Id.* Rountree contends that upon approaching his customer to speak to him, Defendant BPD Sergeant Troy Dyson ordered Rountree to move his truck and leave the scene. *Id.* Mr. Rountree declined to leave, at which time Dyson placed Rountree under arrest and had him transported and booked into the Jefferson County Jail, charging him with stopping within 1000 feet of an accident and having no valid tow truck permit. *Id.*

On January 26, 2016, the defendants jointly filed a Petition for Removal in this federal court, citing the existence of federal question jurisdiction over the plaintiff's claims under 42 U.S.C. § 1983. On March 30, 2016, the Court granted the defendants' unopposed motion to dismiss the state law tort claims against Troy Dyson in his individual capacity. *See Order* (doc. #12).

On May 4, 2016, the defendants filed their pending *Rule (b)(1) &(6) Motion to Dismiss* (doc. #14). In this motion, Dyson requests that the plaintiff's remaining Section 1983 claims against him in his individual capacity be dismissed, arguing that the

plaintiff has not met the heightened pleading standard required to state a claim a claim against him in his individual capacity and contending that he is entitled to qualified immunity. The City also argues for its right to assert a plea to the jurisdiction under Texas law. The City next contends that the plaintiff's claims under the Texas Tort Claims Act (TTCA) must be dismissed under Rule 12(b)(1) for lack of jurisdiction because the City has not waived its immunity against the plaintiff's state law claims. Relatedly, the City contends that Rountree failed to provide notice of his claims against the City within six (6) months of the alleged incident as required under the notice provisions of the TTCA. The City next argues that the Section 1983 claims against it must be dismissed because Rountree does not sufficiently state facts establishing how his substantive and procedural due process rights were violated. It also argues that Rountree has not pointed to a single, formal written policy promulgated by the City of Beaumont which would support his Section 1983 claims as required.

Plaintiff responded to the first motion to dismiss (doc. #21), specifically discussing his false arrest claims and related due process violations under Section 1983. He argues that the defendants wrongfully argue that a heightened pleading standard applies to his claims. He further contends that probable cause did not exist to support his arrest. Rountree also argues that his pled allegations support a claim malicious prosecution and a cause of action for Fourth Amendment wrongful search and seizure. He also avers that his allegations support his claim that the City violated his Equal Protection and Due Process rights because it discriminated against him in its enforcement of towing licensing. He contends that

the Chief of Police acted as a policymaker regarding towing enforcement and therefore the City is liable for violations of Mr. Rountree's equal protection rights. He finally contends that the law was clearly established at the time the alleged civil rights violations occurred.

On August 29, 2016, the plaintiff filed his First Amended Original Complaint (doc. #22). A comparison of this live pleading to the previous petition shows that the First Amended Complaint is substantively similar to the pleading filed in state court, but Rountree expands upon some of his factual allegations and he clarifies the specific causes of action that he is pleading against the two defendants. *See First Amended Complaint*, at 1, 10, 13, 19, 25-37, 50. Consistent with the prior order of dismissal of certain claims against defendant Dyson, the First Amended Complaint now asserts the following causes of action: a Section 1983 claim against the City for violating Rountree's equal protection and due process rights (¶19); tort claims for intentional infliction of emotional distress, false arrest/false imprisonment, and malicious prosecution against the City (20-22, 24-35, 40-47); and a Section 1983 claim against the City and Dyson arising from alleged false arrest/false imprisonment, and malicious prosecution (24-36).

After Plaintiff filed his amended complaint, separate counsel appeared on behalf of defendant Troy Dyson and filed a new motion to dismiss the plaintiff's amended complaint. Specifically, Dyson now seeks dismissal of Rountree's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing, in summary, that the facts alleged against him related to the false arrest of Rountree are insufficient to state a claim for relief upon which relief

may be granted. *See Motion to Dismiss* (doc. #25). Dyson contends that many of the plaintiff's statements in this First Amended Complaint are conclusory, self-serving, speculative, and constitute impermissible legal conclusions. He further argues that the primary deficiency within Plaintiff's First Amended Complaint is the failure "to attribute any particular improper, unreasonable, or unconstitutional action to Dyson." *Id.* at p. 18. Dyson contends that the facts alleged in the plaintiff's First Amended Complaint actually establish that at all times, Dyson had probable cause to arrest Rountree under the applicable city ordinances. *Id.* at pp. 18-19. Based on the foregoing, Dyson argues that the plaintiff's claims against him under Section 1983 and in his official capacity should be dismissed for failure to state an actionable claim. *Id.* at pp. 10-21. He also asserts that the plaintiff's Section 1983 claims fail because his pleadings fail to overcome Dyson's qualified immunity. *Id.* at pp. 21-28. Finally, Dyson argues that any exemplary damages claim against him must be dismissed. *Id.* at p. 28.

Plaintiff responded to Dyson's motion to dismiss. *See Response* (doc. #29). He points to the factual allegations in his amended complaint to argue against dismissal. More specifically, he contends that he was properly on the scene of the accident in question made the basis of his false imprisonment/false arrest because he arrived for a consent tow, as opposed to a non-consent tow. *See Response*, at p. 4. He argues that his factual allegations create an issue as to whether there was probable cause to support Dyson's arrest of Rountree. *Id.* at p. 5. Rountree also argues that under the applicable case law, his Fourth Amendment rights

were clearly established under the circumstances long before his arrest in 2014. *Id.* at p. 7.

Defendant Dyson replied to the plaintiff's response regarding Dyson's motion to dismiss. *See Reply* (doc. #32). Dyson first argues that Rountree wrongfully attempts to inject a malicious prosecution claim against Dyson into the case in his response. *Id.* at p. 3. Defendant next points out that the plaintiff failed to address his Fourteenth Amendment, official capacity or punitive damages claims against Dyson in his response. *Id.* at p. 4. Dyson also contends that the plaintiff's arguments related to the probable cause supporting his arrest are incorrect in that he fails to address the applicable City ordinances that he was charged with violating. *Id.* at p. 5. Defendant alternatively contends that even if Dyson's reliance on the ordinances was misplaced, he is still entitled to qualified immunity under the factual circumstances as pled because he acted objectively reasonable. *Id.* Relatedly, Dyson argues that the plaintiff fails to make any valid argument or identify anything in his pleading establishing that Dyson acted objectively unreasonable in light of any clearly established law. *Id.* at p. 7.

II. Discussion

A. Rule 12(b)(1) Standard

Where dismissal is sought for lack of subject matter jurisdiction, the proper procedure is a motion filed pursuant to Federal Rule of Civil Procedure 12(b)(1). *Cupit v . United States*, 964 F. Supp. 1104, 1107 (E.D. La. 1997) (citing *Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1156-57 (5th Cir. Unit B March 1981). If a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court

should consider the jurisdictional attack under Rule 12(b)(1) before addressing any attack on the legal merits. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir.), *cert. denied* 536 U.S. 960 (2002)(citations omitted); *see also Goudy-Bachman v. United States Dep't of Health and Human Svcs*., 764 F. Supp. 2d 684, 689 (M.D. Pa. 2011)(citing *Tolan v. United States*, 176 F.R.D. 507, 509 (E.D. Pa. 1998) ("[w]hen a motion is premised on both lack of subject matter jurisdiction and another Rule 12(b) ground, mootness concerns dictate that the court address the issue of jurisdiction first.")) A motion to dismiss for lack of subject matter jurisdiction must be considered before any other challenge because the court must find jurisdiction before determining the validity of a claim. *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994) (internal citations omitted).

A motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle the plaintiff to relief. *Ruiz v. Donahue*, 569 F. App'x 207, 210 (5th Cir. 2014) (per curiam) (quoting *Ramming*, at 161). In considering a motion to dismiss, the district court must accept as true the allegations and facts set forth in the complaint and may consider matters of fact which may be in dispute. *Id.*

When considering a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court may evaluate (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Bryan v. Stevens,* 169 F. Supp. 2d 676, 681 (S.D. Tex. 2001) (citing *Den Norske*

Stats Oljeselskap As v. Heeremac Vof, 241 F.2d 420, 424 (5th Cir. 2001), *cert. denied* 534 U.S. 1127)). In reviewing the plaintiff's pleading, the Court will consider whether it has the statutory or constitutional power to adjudicate this case. *See Neinast v. Texas*, 217 F.3d 275, 278 n.6 (5th Cir.), *cert. denied* 531 U.S. 1190 (2001). The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *Ramming*, 281 F.3d at 161 (citations omitted). Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist. *Id. See also Stockman v. Federal Election Comm'n*, 138 F.3d 144, 151 (1998) (the party seeking to invoke the jurisdiction of a federal court carries the burden of demonstrating that jurisdiction is proper).

B. Rule 12(b)(6) Standard

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). To be plausible, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *In re Great Lakes,* 624 F.3d at 210 (quoting *Twombly*, 550 U.S. at 555). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 662, 129 S. Ct. 1937, 1949, L. Ed. 2d 868 (2009).

The relevant federal pleading standard is articulated in the Supreme Court's decisions in *Twombly* and *Iqbal*, *supra*. In *Twombly* and *Iqbal*, the

Supreme Court confirmed that Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief."FED R. CIV. P. 8(a)(2); *see also Iqbal*; 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 555. In deciding whether the complaint states a valid claim for relief, the court accepts all well-pleaded facts as true and construes the complaint in the light most favorable to the plaintiff. *In re Great Lakes,* 624 F.3d at 210. The Court does not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Id.* Quoting *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007). While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. *Iqbal*, 129 S. Ct. at 1940. The inquiry focuses on the allegations in the pleadings and not on whether the plaintiff actually has sufficient evidence to succeed on the merits. *Ackerson v. Bean Dredging, LLC*, 589 F.3d 196, 209 (5th Cir. 2009). On a motion to dismiss, the court is therefore directed to look solely at the allegations on the face of the pleadings. *See id.; see also Southwestern Bell Telephone, L.P., v. City of Houston*, 529 F.3d 257, 263 (5th Cir. 2008) ("when deciding, under Rule 12(b)(6), whether to dismiss...the court considers, of course, only the allegations in the complaint.").

C. Application: Causes of Action Against the City

(1) State Law Claims Against the City

First, the Court will consider the City's jurisdictional arguments regarding the plaintiff's state law tort claims. Governmental immunity exists to protect the State and its political subdivisions from

lawsuits and liability for money damages and defeats a court's subject matter jurisdiction. *See Quinn v. Guerrero*, No. 4:09CV166, 2016 WL 4529959, at *1 (E.D. Tex. Aug. 9, 2016)(Bush, J.), *adopted by* 2016 WL 4508227 (Schell, J.)(citing *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008); *Modica v. Reyna*, 2009 WL 2827975, at *6 (E.D. Tex. Sept. 9, 2009)(Heartfield, J.), *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012)). Here, the City argues that the Court lacks subject matter jurisdiction to hear the plaintiff's state law tort claims under the TTCA because of governmental immunity.

Under the TTCA, "a Texas governmental unit is generally immune from tort liability unless the legislature has somehow waived immunity." *Quinn*, at *2 (quoting *Forgan v. Howard Cnty., Texas*, 494 F.3d 518, 520 (5th Cir. 2007). The City is a "governmental unit" as defined by the TTCA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(3)(B). "[T]he Tort Claims Act is the only, albeit limited, avenue for common-law recovery against the government [and] all tort theories alleged against a governmental unit ... are assumed to be [under the Tort Claims Act]." *Quinn*, at *2 (quoting *Garcia*, 253 S.W.3d at 659 (citations omitted)). Thus, the City is immune from suit unless the TTCA expressly waives immunity.

The plaintiff's response (doc. #21) to the City's motion to dismiss is silent as to whether he contends that the City's immunity to his Texas common law claims has been waived in this case. As summarized above, his live pleading asserts common law causes of action against the City for intentional infliction of emotional distress. *See First Amended Complaint* (doc. #22), at 22. He also appears to assert claims for false arrest/false imprisonment and malicious

prosecution against the City. *Id.* at 24-33; 48. He vaguely states in his pleading that the "Defendant City is a governmental unit for which the TTCA waives immunity," but he offers no legal explanation for this assertion in his pleading or his response. *See id.* at 41. The applicable law, however, convinces this Court otherwise.

Under the TTCA, a governmental unit may only be held liable for:

"(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:

(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(B) the employee would be personally liable to the claimant according to Texas law; and

personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."

TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West). None of the above circumstances are at issue in the plaintiff's pled allegations. For the City to be held liable for the acts of any of its employees under the TTCA, the claim must arise under one of these specific areas of liability (property damage, personal injury or death caused by negligence), and (2) the claim must not fall within an exception to the waiver of sovereign immunity. *See Quinn*, at *2 (quoting *Holland v. City of Houston*, 41 F. Supp. 2d 678, 710 (S.D. Tex. 1999)). In a relevant exception, "the TTCA

does not apply to claims arising out of an intentional tort." *Id.* Quoting *Goodman v. Harris County*, 571 F.3d 388, 394 (5th Cir. 2009). In fact, the TTCA specifically states that "[t]his chapter does not apply to a claim. . . arising out of. . .false imprisonment, or *any other intentional tort*[.]" TEX. CIV. PRAC. § REM. CODE ANN. § 101.057(2)(emphasis added).

All of the Texas common law claims asserted by the plaintiff against the City fall clearly within this exception. *See, e.g., Kroger Tex., L.P. v. Suberu*, 216 S.W. 3d 788, 796 (Tex. 2006)(the tort of IIED requires intentional or reckless act by the defendant as an element); *Hayes v. Nacogdoches County*, No. 6:15-CV-608-JDL, 2016 WL 6235510, at *13 (E.D. Tex. Oct. 25, 2016)(Love, J.)(citing *Craig v. Dallas Area Rapid Transit Auth.*, 504 F. App'x 328, 334 (5th Cir. 2012))(malicious prosecution is an intentional tort under Texas law); *Travis v. City of Grand Prairie*, 64 F. App'x 161, 166-67 (5th Cir. 2016)(plaintiff's state law claims alleging false imprisonment[1], defamation, malicious prosecution, and intentional infliction of emotional distress were properly dismissed as based on intentional torts). The factual basis describing the alleged false imprisonment and malicious prosecution claims show that the specific conduct alleged by Plaintiff is clearly intentional in nature. *See First Amended Complaint*, at 31-35; *see also Quinn*, at *4. The gravamen of plaintiff's allegations about the false arrest incident are that Dyson intentionallyarrested Rountree despite knowing that "Mr. Rountree was acting in a legal manner at all times", Dyson

[1] False arrest is not a separate cause of action from false imprisonment; false arrest is simply a means of committing a false imprisonment. *O'Connor's Texas Causes of Action*, at 253 (2017)(citing *Whirl v. Kern*, 407 F.2d 781, 790 (5th Cir. 1968)).

transported Rountree to the jail and charged him, and the City allegedly destroyed the video of the scene of his arrest. *See First Amended Complaint*, at 31-35. Because Rountree's state law claims against the City are intentional in nature, they do not fall under the purview of the TTCA, are barred by governmental immunity, and accordingly must be dismissed for lack of subject matter jurisdiction. *See, e.g. Quinn*, at *3; *see also Hayes*, at *13.

(2) Section 1983 Municipality Claim Against the City in General

Section 1983 prohibits any person acting under color of law from subjecting another person to the deprivation of any rights, privileges or immunities secured by the Constitution. *See* 42 U.S.C. § 1983. Accordingly, "to state a claim under 42 U.S.C. § 1983, a plaintiff must first show a violation of the Constitution or of federal law, and then show that the violation was committed by someone acting under color of state law." *Turner v. Lieutenant Driver*, 846 F.3d 678, 685 (5th Cir. 2017)(quoting *Atteberry v. Nocona Gen. Hosp*., 430 F.3d 245, 252-53 (5th Cir. 2005)). Furthermore, when a Section 1983 suit is brought against a governmental entity, a plaintiff must plead facts which show that: (1) a policy or custom existed; (2) the governmental policy makers actually or constructively knew of its existence; (3) a constitutional violation occurred; (4) and the custom or policy served as the moving force behind the violation. *Meadowbriar Home for Children, Inc. v. Gunn,* 81 F.3d 521, 533 (5th Cir.1996). Municipal liability therefore requires proof of three elements - a policymaker, an official policy, and a violation of constitutional rights whose moving force is the policy or custom. *See Zarnow v. Wichita*

Falls, Tex. 614 F.3d 161, 167 (5th Cir.); *cert. denied* 564 U.S. 1038 (2011). The Fifth Circuit has defined "official policy" as: U.S. 1038 (2011). The Fifth Circuit has defined "official policy" as:

"1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

2. A persistent, widespread practice of city officials or employees, which, although not authorized by official adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority."

Johnson v. Deep East Tex. Reg'l Narcotics Trafficking Task Force, 379 F.3d 293, 30 9 (5th Cir. 2004). "The first type of 'policy' is characterized by formal rules and understandings which constitute fixed plans of action to be followed under similar circumstances consistently over time." *Akins v. Liberty County,* No. 1:10-CV-328, 2014 WL 105839 at *10 (E.D. Tex. Jan. 9, 2014)(Crone, J.)(citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986)). Plaintiff's complaint does not allege a formal, promulgated policy. Instead, he appears to allege the second type of policy or custom, which is based upon persistent, widespread practices, *i.e.*, conduct that has become a traditional way of carrying out policy and has acquired the force of law. *Id.* Quoting *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir.), *cert. denied* 472 U.S. 1016 (1985). "Consistent with the

commonly understood meaning of custom, proof of random acts or isolated incidents generally is not sufficient to show the existence of a custom or policy." *Akins,* 2014 WL 105839, at *11. To demonstrate a governmental policy or custom under § 1983, a plaintiff must show at least a pattern of similar incidents in which the citizens were injured. *Id.* Citing *Estate of Davis ex. rel. McCully v. City of North Richland Hills*, 206 F.3d 375, 383 (5th Cir. 2005). Only if the plaintiff demonstrates that his injury resulted from a "permanent and well settled" practice may liability attach for injury resulting from a local government custom. *Id.* Citing *City of St. Louis v. Praptronik*, 485 U.S. 112, 127 (1988).

Rountree claims that Chief Singletary, former Mayor Becky Ames, and the City Council constitute policy makers with regard to the plaintiff's claims. *See First Amended Complaint*, at 38. Rountree avers that they promulgated policies and procedures which encouraged Sergeant Dyson to employ false arrest and false imprisonment actions and being deliberately indifferent to pretrial detainees. *Id.* Plaintiff vaguely states that "the number of Defendant City's police officers performing the false arrest and false imprisonment without probable cause cases, suggests that it was carried out according to that policy or custom." *Id.* He also alleges that the City failed to adequately train its officers regarding the false arrests without cause. *Id.* at 39. Rountree also contends that the "police chief is the city's policymaker when it comes to mattes of regulating towing including charging tow truck drivers and tow truck license suspension", but his complaint is silent as to any specific and widespread City policy or custom governing tow truck regulations. *See id.* at 10.

The Court finds that Plaintiff's complaint does not sufficiently state a policy or custom giving rise to Section 1983 liability. The only specific instance of "encourag[ing]" false arrest he cites is his own arrest by Sergeant Dyson. Otherwise, he merely vaguely references "persistent, widespread practices" of this type of alleged conduct, but he fails to point to a number of specific instances or a time period in which those instances occurred. A pattern requires sufficiently numerous prior incidents, as opposed to isolated incidents. *See Peterson v. City of Forth Worth, Tex.*, 588 F.3d 838, 851 (5th Cir. 2009)(internal citations omitted). Other than the description of his own alleged false arrest and imprisonment, there are no specifically pled facts pointing to any other instances. Rather, his complaint vaguely references an overall alleged widespread practice by the City, without any other factual instances pled in support. This conclusory allegation and verbatim recitation of the applicable legal standards without the benefit of specific supporting facts are insufficient to state a policy or custom. *See Peterson*, at 851 ("It is thus clear that a plaintiff must demonstrate 'a pattern of abuses that transcends the error made in a single case.'")(quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 582 (5th Cir.), *cert. denied* 534 U.S. 820 (2001)); *see also Pena v. City of Rio Grande City, Tex.*, No. 7:16-CV-79, 2016 WL 6084639, at *3 (S.D. Tex. Oct. 17, 2016)(merely concluding, without additional factual support, that the alleged practices existed, is insufficient to state a claim for municipal liability)). Because the plaintiff's pleading fails to sufficiently state a policy or custom, it follows that he has also failed to plead that any City policy was the moving force behind his alleged injuries, or in other words,

that there is a direct causal link between the policy and the deprivation of his constitutional rights. *See Piotrowski*, at 580.

The plaintiff's assertion of a "failure to train" allegation requires the same result. The plaintiff must show that the City's failure to train was deliberately indifferent to the constitutional rights of citizens. *Cardenas v. Lee County, Tex.*, 568 F. App'x 252, 257 (5th Cir. 2014)(per curiam). A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for failure to train. *Carter v. Diamond URS Huntsville, LLC*, NO. H-14-2776, 2015 WL 3629793, at *6 (S.D. Tex. June 10, 2015)(internal citations omitted); *see also Cardenas*, at 257 (quoting *Connick v. Thompson*, 563 U.S. 51, 131 S. Ct. 1350, 1359 (2011)). Establishing deliberate indifference generally requires a showing that the municipality failed to change its training methods in the face of several incidents in which the training methods caused constitutional deprivations. *Id.* Citing *Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003); *Connick*, 131 S. Ct. at 1360.

As discussed above, Rountree has wholly failed to plead any factual allegations related to separate incidents in which others suffered constitutional deprivations due to the City's alleged failure to properly train its officers. His municipal liability claims against the City pursuant to Section 1983 must therefore be dismissed for failure to state a claim upon which relief may be granted.

D. Application: Section 1983 Procedural Due Process Claims against Both Defendants

Separate and apart from the "policy and custom" allegations, Rountree also asserts that the City violated his due process rights under the Fourteenth Amendment when it failed to provide a fair, impartial and unbiased tribunal in applying the city ordinances when it suspended and revoked his license. *See First Amended Complaint*, at ¶ 19.

The plaintiff's complaint further references both Dyson and the City in alleging that "[d]efendants also violated Mr. Rountree'[s] right to substantive and due process." *Id.* at ¶ 36. To be thorough, and viewing the alleged facts in the most favorable light to Plaintiff, the Court will analyze the due process claim as it references to both defendants.

To state a Fourteenth Amendment due process claim under Section 1983, a plaintiff must first identify a protected life, liberty or property interest[2] and then prove that governmental action resulted in a deprivation of that interest. *Jabary v. City of Allen*, 547 F. App'x 600, 606 (5th Cir. 2013)(quoting *Gentillello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010)). In procedural due process claims, "the deprivation by state action of a constitutionally protected interest ... is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Id.* Quoting *Zinermon v. Burch,* 494 U.S. 113, 125 (1990)(emphasis in original)).

Assuming that Rountree has a protected property right in his City-issued towing permit[3], the

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[2] The Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property without due process of law." U.S. CONST. AMEND. XIV, § 1.

[3] Fifth Circuit precedent does indicate that "privileges, licenses, certificates, and franchises. . .qualify as property interests for

Fourteenth Amendment requires that the governmental entity afford the plaintiff some type of procedural process - generally notice and a hearing - before revoking a property interest. *See Hartman v. Walker*, No. 1:13-CV-355, 2015 WL 5470261, at *19 (E.D. Tex. Sept. 16, 2015)(Crone, J.)(adopting recommendation by Hawthorn, J.)(citing *Bowley v. City of Aberdeen, Miss*., 681 F.3d 215, 220 (5th Cir 2012)); *see also Jabary*, at 636 (once issued, a license or permit cannot be taken away by the State without due process)(quoting *Bowlby v. City of Aberdeen*, 681 F.3d 215, 220 (5th Cir. 2012)). In determining specifically what process is due in a given situation, courts balance three factors: "(1) the private interest that will be affected by the official's actions, (2) the risk of an erroneous deprivation of that private interest and the probable value, if any, that additional procedural protections would provide, and (3) the interest that the government seeks to achieve." *Vincent v. City of Sulphur*, 28 F. Supp. 3d 626, 639 (W.D. La. 2014)(quoting *Sys. Contrs. Corp. v. Orleans Parish Sch. Bd.,* 148 F.3d 571, 575 (5th Cir.1998)). The question thus becomes if sufficient procedures were afforded to Rountree before the deprivation of his protected property interest in his towing license. *See Jabary*, at 606.

In summary, Rountree complains that the City initially suspended his towing permit, and then ultimately revoked it for two years based on various violations, as stated above and set forth in his pleading. *See First Amended Complaint*, at ¶ 7-11. His

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purposes of procedural due process." *Jabary v. City of Allen*, 547 F. App'x 600, 606 (5th Cir. 2013)(quoting *Bowlby v. City of Aberdeen*, 681 F.3d 215, 220 (5th Cir. 2012))

complaint is silent as to whether he received notice prior to the revocation of his permit or exactly what process, if any, was provided before the suspension and revocation. He does indicate that he received a suspension letter from the police chief, but he does not indicate when the letter was issued or if he received any notice prior. *Id.* at 10. He next states that he did in fact appeal the suspensions/revocations and his appeal was heard by the Mayor and City Council. *Id.* at 14. The City Council and Mayor opted to "back the police chief in his decision" after hearing Rountree's appeal. *Id.* He also contends that the City had provided him with towing ordinances several years prior to the revocation proceeding, but those ordinances proved to be incomplete copies. *Id.* at 15. He states that he has repeatedly brought his grievances related to the sentence he received for the towing violations up at Council meetings and through numerous requests for rehearing, but the Mayor and Council have not granted his request for rehearing. *Id.* at 16. He also claims that the City, at the direction of city attorney Tyrone E. Cooper, caused 390 municipal court summons to be filed against him with fines totaling over $145.000. *Id.* at 17.

Plaintiff's complaint admits that he availed himself of the governing judicial process when he appealed the suspension and revocation of his towing permit to the City Council and Mayor. The Council and Mayor heard his appeal, according to the facts pled by plaintiff, before they reached the decision to affirm the Chief's decision on the revocation of the permit. Plaintiff's complaint does not indicate when he was informed of the suspension and revocation of his permit, but he does acknowledge that he received a suspension letter from the officer in charge of towing

permits. He also clearly was notified about his right to appeal and request a hearing before the Council challenging the revocation, given that he admittedly appeared for that hearing. There is no direct allegation that the City failed to provide any process before revoking his permit. *See, e.g., Bowlby*, 681 F.3d at 221. At the same time, Rountree states that "the Defendant City violated Mr. Rountree's procedural due process rights by failing to provide a fair, impartial, and unbiased tribunal to hear his appeal and by failing to provide a new hearing when presented evidence that it had improperly applied the ordinance to Mr. Rountree's fact situation."[4] *See First Amended Complaint*, at ¶ 19. He also indicates that Chief Singletary was the primary actor in depriving

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[4] 4In his complaint, Rountree references the due process provisions of both the Fifth Amendment and Fourteenth Amendment. His pleading is not the model of clarity regarding the specific basis for his constitutional due process allegations. To the extent that his due process claims are based on the Fifth Amendment, they must be dismissed because the Fifth Amendment only "proscribes deprivation of life, liberty, or property without due process of law by *federal* actors while the Fourteenth Amendment proscribes such action by *state actors*." *Marceaux v. Lafayette City Par. Consol. Gov't*, 921 F. Supp. 2d 605, 631 (W.D. La. 2013)(emphasis added). There is no dispute that the defendants are state actors. The plaintiff has not alleged that any federal actor deprived him of rights.. Accordingly, to the extent that the plaintiff pleads a Fifth Amendment due process claim, that claim is not cognizable and must be dismissed.

him of his due process rights in taking his property and that the Mayor and Council condoned the Chief's conduct *See id.* None of these individuals are named as defendants in Plaintiff's complaint.

Taking these factual allegations as true and viewing them in the most favorable light to the plaintiff, Rountree has stated facts which, if true, could support a plausible claim that his procedural due process rights were violated during the course of the proceedings related to the revocation of his towing permit. The inquiry does not end here, however.

Even presuming that the plaintiff was given no opportunity to have his deprivation reviewed and provided no neutral or impartial hearing body or officer, the plaintiff's pleading leaves questions with respect to any individual defendant against whom he has adequately pled a violation of his procedural due process rights. *See Jabary*, 547 App'x at 607. The only individuals he vaguely references regarding his procedural due process claims are not named defendants. The named individual defendant, Dyson, is not factuallylinked to the administrative process resulting in the loss of Rountree's towing permit as described in the complaint. In Section 1983 suits, a plaintiff must establish that the defendant was either personally involved in the alleged deprivation or that the official's wrongful actions were casually connected to the deprivation. *See Jabary*, at 607 (quoting *Jones v. Lowndes County, Miss.*, 678 F.3d 344, 349 (5th Cir. 2012)). Plaintiff has failed to plead either of these situations in support of his procedural due process claim. As discussed above, the City also cannot be held liable for any procedural due process violations of its employees absent a showing of a policy or custom. *See Quinn*, 2016 WL 4529959, at *7 (citing *Monell v. Dept.*

of Soc. Servs. of City of New York, 436 U.S. 658, 690 (1978)("[t]here is no vicarious liability against a governmental entity for the actions of its employees unless there is as showing of a policy or practice approved by the entity"). For these reasons, Rountree's Section 1983 procedural due process claim is deficiently pled against the named defendants and must be dismissed for failure to state a claim upon which relief may be granted.

E. Application: Substantive Due Process Claim Against Both Defendants

Plaintiff's complaint only vaguely suggests that he is asserting a substantive due process claim against the defendants. *See First Amended Complaint*, at ¶ 36 ("Defendants also violated Mr. Rountree's right to substantive and procedural due process"). The complaint is not specific as to the constitutional deprivation upon which Mr. Rountree bases his substantive due process claim. Viewing the pled facts in context and the most favorable light, the Court can only surmise that Rountree is claiming that his substantive due process rights were violated in the course of the alleged false arrest and imprisonment without probable cause. *See id.* at ¶ 36.

The Fifth Circuit has stated and continues to state that the right to be free from an illegal or false arrest and malicious prosecution are protected under the Fourth and Fourteenth Amendments to the Constitution. *See O'Hara v. Petal Police Dep't*, No. CIV.-A. 2:05CV103KS, 2006 WL 2583092, at *3 n.2 (S.D. Miss. Sept. 6, 2006), *aff'd*, 260 F. App'x 632 (5th Cir. 2007). This Court recognizes, as has the Fifth Circuit, that the Supreme Court has held that pretrial deprivations of liberty are actionable only under the Fourth Amendment and not under the substantive

due process guarantees of the Fourteenth Amendment. *Id.* Citing *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed.2d 114 (1994) and *Eugene v. Alief Indep. Sch. Dist .,* 65 F.3d 1299 (1995). The Court again notes that the plaintiff's complaint is not the model of specificity in designating the basis of his due process claim. To the extent that they are based on the Fourteenth Amendment due process clause, the Court concludes that they are not viable under the precedent cited above.

Insofar as the plaintiff's due process claims sound under the Fourth Amendment (*see First Amended Complaint*, at ¶ 37), they fail to state a claim for relief. First, as to the City, the Court reiterates that the plaintiff must establish that an official policy promulgated by a municipal policymaker was the moving force behind the alleged violations of his substantive due process rights in order to sustain a Section 1983 municipal liability claim. *See Lisle v. City of Plano*, No. 4:15-CV- 372, 2016 WL 5415431, at *3 (E.D. Tex. Sept. 28, 2016)(Mazzant, J.)(analyzing substantive due process municipal liability claim). As discussed above, the plaintiff has failed to plead any such City policy with the requisite indication that it was widespread and pervasive, or that the City officially adopted any regulation, ordinance, or decision which was the moving force behind the alleged substantive due process deprivation. *See id.*

A single discretionary action by a municipal official can constitute official policy under Section 1983 if the municipal official had the authority to promulgate final municipal policy regarding the action ordered. *Id.* Citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482 (1986). Rountree has not plead any facts suggesting that Dyson was an official

policymaker for the City. Dyson is the only city employee referenced in relation to the false arrest claims made the basis of the substantive due process cause of action. Because the plaintiff has not adequately pled the existence of a City policy or established that defendant Dyson could be considered a final policymaker, he has not pled facts satisfying the necessary policy or custom elements to support a Section 1983 claim for substantive due process against a municipality. The substantive due process claim against the City must therefore be dismissed.

A violation of substantive due process occurs only when the government deprives an individual of liberty or property. *Liu v. Moorman*, No. 4:09-CV-415-A, 2010 WL 2301019, at *5 (N.D. Tex. June 3, 2010), *aff'd sub nom. Siyuan Liu v. Jackson*, 418 F. App'x 354 (5th Cir. 2011)(quoting *Brennan v. Stewart,* 834 F.2d 1248, 1257 (5th Cir. 1988)). To state a viable claim of substantive due process, plaintiff must demonstrate that the state official "acted with culpability beyond mere negligence." *Id.* Quoting *McClendon v. City of Columbia,* 305 F.3d 314, 325 (5th Cir.2002). Stated differently, plaintiff must allege conduct which "shocks the conscience." *Id.* Quoting *County of Sacramento v. Lewis,* 523 U.S. 833, 846–847 (1998). Plaintiff has not pointed to any conduct on the part of Dyson which suggests anything beyond mere negligence, much less rising to the level of "shocking the conscious." Furthermore, as discussed below, Plaintiff's pleading fails to overcome Dyson's entitlement to qualified immunity as to this claim.

F. Application: Section 1983 Equal Protection Claim

Rountree asserts that his equal protection rights under the Fourteenth Amendment were

violated by the City when it suspended his towing license for two years, treating him differently than similarly situated tow truck drivers and businesses, and by failing to provide a fair, impartial and unbiased tribunal in applying the city ordinances when it decided to suspend his license. *See First Amended Complaint*, at ¶ 19.

Supreme Court equal protection jurisprudence has typically been concerned with governmental classifications that affect some groups of citizens differently than others. *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 601 (2008)(citing *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)). The Supreme Court has recognized that a party can bring an equal protection claim based on a "class of one." *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). To make such a showing, the plaintiff must show that (1) he was intentionally treated differently from others similarly situated, and (2) there was no rational basis for the difference in treatment. *Hartman*, at *21 (citing *Lindquist v. City of Pasadena, Tex.*, 669 F.3d 225, 233 (5th Cir 2012). The Supreme Court has, however, also noted:

"[t]here are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to

exercise."

"[t]here are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise."

Here, the plaintiff complains that the City suspended his towing license for two years while at the same time no other similarly situated tow truck driver or business was subjected to the same treatment even though other tow truck companies also committed violations. From the facts pled, there was at least a rational basis given for suspending Rountree's license - a complaint was lodged against his company based on the lapse of three of Rountree's state-issues licenses in 2013. *See First Amended Complaint*, at ¶ 7. Nowhere in Rountree's complaint does he deny that his licenses had expired. Rather, he contends that he was treated differently than other companies who also had lapsed licenses. Under a rational basis review, a court affords governmental decisions a strong presumption of validity, and will uphold a governmental decision if there is any reasonably conceivable state of facts that could provide a rational basis, actual or hypothetical. *Hartman*, at *22; *see also Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). Accordingly, even assuming that

Rountree was intentionally treated differently from other similarly situated towing company owners as stated in his pleading, there was a rational basis for the treatment given that his state-issued licenses had admittedly lapsed. *See Lindquist*, at 233 (an equal protection "class of one" requires a showing that the plaintiff was intentionally treated differently from others similarly situated and there was no rational basis for the difference in treatment.) Much like the hypothetical traffic officer in *Engquist*, the City was engaged in a form of state action which, by its nature, involved discretionary decisionmaking. *See Engquist*, 553 U.S. at 603. Just like all speeders cannot be stopped and ticketed, all towing companies with lapsed licenses may not be punished in the same manner. Complaining that the plaintiff has been singled out in and of itself does not invoke a finding of improper governmental classification. *See id.* The complaint challenges the legitimacy of the underlying decision itself, and the Court has determined that there is a rational basis for that decision. Given the foregoing, the Court must therefore conclude that Rountree has failed to state a claim that the City violated his rights under the Equal Protection clause.

G. Application: Claims Against Defendant Dyson and his Qualified Immunity

Notwithstanding the Court's substantive analysis of Plaintiff's claims, whether Rountree has sufficiently stated a Section 1983 claim for relief against Dyson requires the analysis of whether Dyson is entitled to qualified immunity. Qualified immunity shields a state actor official from civil liability for damages based upon the performance of discretionary functions if the official's acts were objectively reasonable in light of then clearly established law.

Harlow v. Fitzgerald, 457 U.S. 800 (1982); *see also Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2085 (2011)("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions."). Thus, qualified immunity "shields from civil liability 'all but the plainly incompetent or those who knowingly violate the law.'" *Manis v. Lawson*, 585 F.3d 839, 845 (5th Cir. 2009)(quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The qualified immunity examination involves two separate issues: whether the facts that Plaintiff has alleged make out a violation of constitutional right, and whether the right at issue was clearly established at the time of the defendant's alleged conduct. *See Hartman*, 2015 WL 5470261, at * 15 (citing *Pearson v. Callahan,* 555 U.S. 223, 232 (2009)); *see also Iqbal*, 556 U.S. at 676 (to defeat a defendant's assertion of qualified immunity at the pleadings stage, the plaintiff "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.") In addition, if the test is met, courts then "ask whether the official's conduct was objectively unreasonable in light of the established constitutional right." *Id.* Quoting *Aucoin v. Henry,* 306 F.3d 268, 272 (5th Cir. 2002). Stated differently, the plaintiff must also allege facts that show that the violation was objectively unreasonable, that is, a reasonable government official, in the light of clearly established law, would not have acted so. *Little v. Obryan*, 655 F. App'x 1027, 1029 (5th Cir. Aug. 3, 2016)(citing *Anderson v. Creighton*, 483 U.S. 635, 639–40 (1987)). "Whether an official's conduct is objectively reasonable depends upon the circumstances confronting the official as well

as 'clearly established law' in effect at the time of the official's actions." *Sanchez v. Swyden*, 139 F.3d 464, 467 (5th Cir. 1998)(quoting *Anderson*, 483 U.S. at 641).

The Court will assume, *arguendo*, that the plaintiff's claims against Dyson are based on clearly established constitutional rights, namely the Fourth Amendment protection against arrest without probable cause. *See Davidson v. City of Stafford*, 848 F.3d 384, 392(5th Cir. 2017)(citing *Hogan v. Cunningham*, 722 F.3d 725, 731 (5th Cir. 2013)). The inquiry therefore focuses on the objective reasonableness of Dyson's actions as pled in light of the circumstances.

Officers are entitled to qualified immunity unless there was no actual probable cause for the arrest and the officers were objectively unreasonable in believing there was probable cause for the arrest. *Id.* at 391-92. Citing *Cooper v. City of La Porte Police Dep't*, 608 F. App'x 195, 199 (5th Cir. 2015). This probable cause may be for any crime and is not limited to the crime that the officers subjectively considered at the time they perform an arrest. *Id.* Citing *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 204 (5th Cir. 2009).

Plaintiff's pled facts state that Dyson arrested the plaintiff for violation of City ordinances prohibiting the stopping within 1000 feet of an accident and having no valid tow truck permit. See First Amended Complaint, at ¶ 32. Plaintiff's own pleading admits that Dyson ordered Rountree to move his tow truck and leave the scene of the accident in question. *Id.* at ¶ 24. Rountree acknowledges that "he declined to follow the sergeant's direction to leave the

scene." *Id.* Given the circumstances, and plaintiff's pled admittances that he refused to leave the scene when directed and that he did not have the necessary permit to tow his customer, Sgt. Dyson was acting objectively reasonable when he placed Rountree under arrest. It cannot be said that *no* reasonable police officer could have believed that probable cause existed to support Dyson's actions. *See Davidson*, at 393-94 (citing *Keenan v. Tejada*, 290 F.3d 252, 262 (5th Cir. 2002)). Rountree's own conclusory assertion that he was acting in a legal manner and was authorized to remain at the scene are irrelevant to the qualified immunity analysis. *See First Amended Complaint*, at ¶¶ 25, 31. *See Hartman*, at * 16 ("reasonableness ... must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.")(quoting *Graham v. Connor,* 490 U.S. 386, 396 (1989); citing *Luna v. Mullenix,* 777 F.3d 221, 222 (5th Cir.2014)(Jolly, J., dissenting)("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments' and 'protects all but the plainly incompetent or those who knowingly violate the law.' ")). Dyson admittedly did not have the necessary permit to tow his customer from the accident scene and he refused to leave when Dyson ordered him to do so. Sergeant Dyson had arrived at the scene of an accident and presumably was tasked with protecting public safety while on the scene. After Dyson asked Rountree to leave and move his truck from the scene and Rountree refused to do so, it was not unreasonable under the circumstances to place Rountree under arrest. As Judge Hawthorn noted in his *Hartman* opinion, "perhaps the situation could have been handled better, but the inquiry is not whether the Defendant[] chose the 'best' course of

action – rather, it is whether their acts were 'objectively unreasonable.'" *Hartman*, at * 17. Rountree's own pled facts indicate that probable cause existed to suggest that Rountree and his tow truck were unlawfully on the scene. Based on the foregoing events as pled, the Court concludes that Dyson did not act unreasonably in arresting Rountree. The plaintiff accordingly has failed to plead a set of facts which overcomes Dyson's entitlement to qualified immunity against the plaintiff's Section 1983 claims against him. Therefore, even if Rountree had sufficiently stated a substantive claim for relief, Dyson's entitlement to qualified immunity as pled dictates that the claims be dismissed.

III. Conclusion

Based upon the findings and legal reasoning stated herein, the undersigned United States Magistrate Judge **ORDERS** that the defendants' motions to dismiss (doc. #14, 25) are **GRANTED**.

The plaintiffs' claims are **DISMISSED** in their entirety, with prejudice, for lack of subject matter jurisdiction and failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(1) and (b)(6) as further explained in this opinion.

As this memorandum opinion disposes of all claims against all defendants, the Court further **ORDERS** that the Clerk **CLOSE** this case. This order constitutes the entry of judgment for appeal purposes.

SIGNED this the 27th day of March, 2017.

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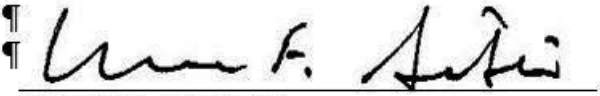
¶ 

KEITH·F.·GIBLIN¶
UNITED·STATES·MAGISTRATE·JUDGE¶

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LANDRY ROUNTREE	**§**	
	§	
Plaintiff,	**§**	
	§	
v.	**§**	**CIVIL ACTION NO.**
	§	**1:16-CV-26**
CITY OF BEAUMONT,	**§**	
TEXAS, AND SERGEANT	**§**	
TROY DYSON	**§**	
	§	
Defendants.	**§**	

ORDER

Pursuant to 28 U.S.C. § 636(c), order of the District Court, and the consent of the parties, this case is before the undersigned United States Magistrate Judge for all matters, including trial and entry of judgment. On May 4, 2016, Defendants filed a Motion to Dismiss [Dkt. 14], arguing for dismissal of this case pursuant to Federal Rule of Civil Procedure 12(b)(1) and (b)(6).

The Court allowed plaintiff's previous attorney to withdraw and time for him to retain new counsel. *See Order* (doc. #18). On July 22, 2016, the plaintiff's new attorney filed his notice of appearance (doc. #19).

Accordingly, given the appearance of new counsel, the Court finds that the plaintiff's deadline to respond to the Motion to Dismiss should be extended, and Plaintiff should be given further opportunity to

explain why this case should not be dismissed for failure to state a claim. At the same time, Defendants' dispositive motion has been pending for almost three months with no response on file. Defendants have been flexible in agreeing to previous extensions of the response deadline. Given the foregoing, and as the undersigned previously admonished in its order granting the motion to withdraw (doc. #18), the Court finds that the latest extension of the response deadline should be brief. Accordingly,

It is therefore **ORDERED** that plaintiff file a response to the pending Motion to Dismiss (doc. #14) no later than ***Wednesday, August 17, 2016.*** Any Reply and/or Sur-Reply, if necessary, should be filed in accordance with the Federal Rules of Civil Procedure and the Local Rules for the United States District Court for the Eastern District of Texas. Should Plaintiff fail to file a Response on or before Wednesday, August 17, 2016, the Court will assume that Plaintiff has no opposition to the Court granting Defendants' Motion to Dismiss. *See* EASTERN DISTRICT OF TEXAS LOCAL RULE CV-7(d). Failure to comply with this order may result in dismissal of the aforementioned case.

IT IS SO ORDERED.

SIGNED this the 1st day of August 2016.

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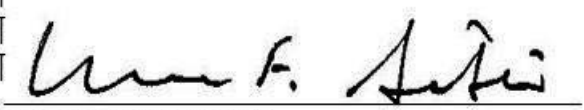

KEITH·F.·GIBLIN¶
UNITED·STATES·MAGISTRATE·JUDGE¶

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

LANDRY ROUNTREE	**§**	
	§	
Plaintiff,	**§**	
	§	
v.	**§**	**CIVIL ACTION NO.**
	§	**1:16-CV-26**
CITY OF BEAUMONT,	**§**	
TEXAS, AND SERGEANT	**§**	
TROY DYSON	**§**	
	§	
Defendants.	**§**	

ORDER DISMISSING DEFENDANT DYSON IN HIS INDIVIDUAL CAPACITY ONLY

In accordance with 28 U.S.C. § 636(c) and the Local Rules for the United States District Court for the Eastern District of Texas, the above-captioned civil action is assigned to the undersigned United States Magistrate Judge for disposition of all matters and trial by consent of the parties. *See Order of*

Reference (doc. #9). Pending before the Court is the defendants' *Motion to Dismiss Troy Dyson Pursuant to § 101.106(E)* (doc. #4), filed February 11, 2016.

To date, the plaintiff has not responded in opposition to the defendants' motion. The Court may therefore deem the motion to dismiss as unopposed. *See* E.D. TEX. R. CV-7(d). Furthermore, upon review of the motion and Texas Civil Practice and Remedies Code Section 101.106, the Court finds the motion to be substantively meritorious. Section 101.106(e)) provides as follows:

"(e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

(f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only."

TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(e)&(f) (West 2015). Here, defendant City of Beaumont contends that the plaintiff has asserted state tort claims against defendant Troy Dyson in his individual capacity. It further argues that the plaintiff's suit against the City of Beaumont involves the same subject matter as these claims against Dyson. *See Motion*, at p. 1. The City therefore requests dismissal of the plaintiff's state law tort claims against Dyson in his individual capacity with prejudice. This Court agrees. *See Tex. Dep't of Aging and Disability Servs v. Cannon,* 453 S.W.3d 411, 418

(Tex. 2015) ("The role of subsections (e) and (f) is to ensure that tort claims within the purview of the [Texas Tort Claims Act] do not proceed against a government employee for conduct within the scope of his employment"); *Franka v. Velasquez*, 332 S.W.3d 367, 384-85 (Tex. 2011) (discussing the Texas Tort Claims Act codified at Section 101.106 and the Texas Legislature's restrictions on government employee liability).

The *Motion to Dismiss* (doc. #4) is **GRANTED**. It is therefore **ORDERED** that the plaintiff's tort claims asserted against defendant Troy Dyson individually are **DISMISSED** in their entirety, with prejudice, pursuant to Section 101.106 of the Texas Civil Practice and Remedies Code. The plaintiff's cause of action against Dyson pursuant to 42 U.S.C. § 1983 as well as all causes of action against the defendant City of Beaumont remain pending.

SIGNED this the 30th day of March 2016.

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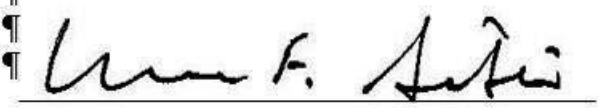

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