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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10217

[Filed November 8, 2019]

VICKIE COOK, Individually and as Natural Mother to Deanna Cook; N. W., a Minor, by and through her Grandparent and Guardian Vickie Cook; A. W., a Minor, by and through her Grandparent and Guardian Vickie Cook,	)
Plaintiffs - Appellants	)
v.	)
TONYITA HOPKINS; KIMBERLEY COLE; JOHNNYE WAKEFIELD; YAMINAH SHANI MITCHELL; JULIE MENCHACA, Officer; AMY WILBURN, Officer; ANGELIA HEROD-GRAHAM; CITY OF DALLAS,	)
Defendants - Appellees	)
VICKIE COOK, Individually and as Natural Mother to Deanna Cook;	)

N. W., a Minor, by and through her Grandparent and Guardian Vickie Cook; A. W., a Minor, by and through her Grandparent and Guardian Vickie Cook; KARLETHA COOK-GUNDY, Individually and as Representative of the Estate of Deanna Cook, Deceased,	)
Plaintiffs - Appellants	)
v.	)
CITY OF DALLAS; ANGELIA HEROD-GRAHAM,	)
Defendants – Appellees	)

Appeal from the United States District Court
for the Northern District of Texas
U.S.D.C. No. 3:12-CV-3788

Before STEWART, CLEMENT, and HO, Circuit Judges.

PER CURIAM:[*]

This appeal arises from Deanna Cook's 911 call to report domestic violence, the Dallas Police

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Department's response to that call, and Deanna's tragic death at the hands of her abuser.

Deanna's mother Vickie Cook, her two minor daughters, and her sister Karletha Cook-Gundy (the Independent Administrator of Deanna's estate) sued Defendants Tonyita Hopkins ("Hopkins"), Kimberley Cole ("Cole"), and Johnnye Wakefield ("Wakefield"), all of whom worked at the 911 call center on the day Deanna died; Yaminah Shani Mitchell ("Mitchell"), the police dispatcher made aware of Deanna's 911 call; Julie Menchaca and Amy Wilburn, the police officers who responded to Deanna's call that day (the "Officers"); Angelia Herod-Graham ("Herod-Graham"), who responded to Deanna's mother's 911 call two days after Deanna's death, when Plaintiffs discovered her body (collectively, the "Individual Defendants"); and the City of Dallas (the "City"), seeking damages pursuant to (i) 42 U.S.C. § 1983, alleging violations of Deanna's Fourteenth Amendment rights to due process and equal protection, and (ii) state-law tort statutes. The district court granted the Individual Defendants' and the City's motions to dismiss in part and then granted Defendants' motions for summary judgment, entering its final judgment on February 6, 2019. The court also denied Plaintiffs' request for additional discovery against the City. We AFFIRM the district court's judgments.

I.

On Friday, August 17, 2012, at 10:54 a.m., Deanna, a 32-year-old mother of two, called 911 to report that she was being attacked in her home by her ex-husband. Deanna had previously called the police to report her

ex-husband's domestic abuse and harassment, both before they were divorced and after the divorce was finalized. Hopkins, a 911 call-center employee with the title of "Call Taker," answered Deanna's call that day. Cole, the call-center supervisor, was not at her post at the time, so Wakefield, a "Senior Call Taker," assisted Hopkins with handling and classifying Deanna's call.

On the call, Deanna was "screaming at the top of her lungs in fear, crying out for assistance," and "screaming help, please stop it" to her attacker. Deanna did not provide her address to Hopkins. Hopkins claims that because Deanna had called from a cellphone, Hopkins could not immediately retrieve Deanna's address, so she enlisted Wakefield to help find the latitude and longitude of Deanna's location. Nearly ten minutes after the call began, Hopkins notified police dispatch, classifying the call as a "Major Disturbance." Hopkins added the comment "urgent!" to her notify report. The line eventually went silent. Wakefield instructed Hopkins to hang up the phone and call Deanna back. The call went to voicemail. Hopkins did not follow up to ensure that police dispatch had actually sent officers to Deanna's residence.

Mitchell was the police dispatcher who received Deanna's location that day. She allowed police officers to volunteer for the call, despite it being marked "urgent." Menchaca and Wilburn, City of Dallas police officers, volunteered to go to Deanna's residence. On the way, the Officers stopped at 7-Eleven for bottles of water. Approximately 50 minutes after Deanna called 911, the Officers arrived at Deanna's home. They

knocked on the door and had the dispatcher call Deanna's cellphone, which went to voicemail. They avoided entering the home from the back entrance because they heard dogs barking. When the Officers didn't get a response, they left the residence and noted that the disturbance had been resolved.

Plaintiffs went to Deanna's home two days later, on Sunday, August 19, 2012, after Deanna failed to show up for church. They noticed her two chihuahuas barking and water leaking from her home. Her mother, Vickie, then called 911. Herod-Graham answered Vickie's call. She told Vickie that no police officers could help Vickie and her family enter Deanna's house unless Vickie called nearby prisons and hospitals first. Plaintiffs then kicked in the patio door of the residence and entered Deanna's bedroom, where they found Deanna deceased, her body partially in the bathtub.

Former Dallas Police Chief David Brown suspended Hopkins, issued Cole a written reprimand, and fired Herod-Graham. Under department policy, Herod-Graham should not have asked Vickie to call prisons and hospitals before sending the police to Deanna's address. Chief Brown and former Dallas Mayor Mike Rawlings also allegedly commented on Deanna's death publicly. According to Plaintiffs, Chief Brown admitted that, "[the 911 operator] obviously failed . . . and it cost the life of Ms. Cook," and Mayor Rawlings stated that, "our safety net wasn't there for her."

Plaintiffs sued Defendants in federal court, bringing § 1983 claims under the Fourteenth Amendment's Due Process and Equal Protection clauses, as well as claims under Texas' negligence, gross negligence, bystander

recovery, wrongful death, and survival laws. They later filed a separate complaint in a separate suit against Herod-Graham, the City, and various telecommunications defendants (but the telecommunications defendants were dismissed). The district court agreed to consolidate the two cases in 2015.

The Individual Defendants all filed Rule 12(b)(6) motions to dismiss for failure to state a plausible claim. With the exception of Cole, against whom all of Plaintiffs' claims were dismissed,[1] the district court dismissed all of Plaintiffs' claims against the Individual Defendants except for their equal protection claims for discrimination based on race, gender, socioeconomic background, and status as a domestic-violence victim.[2] The Individual Defendants, excluding (i) Cole and

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[1] Defendants correctly note that Plaintiffs do not adequately brief Cole's alleged liability under the Fourteenth Amendment. Their briefing makes one off-hand reference to Cole's role in "providing discriminatory practices to Hopkins through training."

[2] The district court correctly noted that government employees cannot request the dismissal of claims filed under the state statute from which Plaintiffs' state-law tort claims arose. *See* Tex. Civ. Prac. & Rem. Code § 101.106(e); *Hernandez v. City of Lubbock*, 253 S.W.3d 750, 755 (Tex. App. 2007) ("We see nothing . . . construing section 101.106(e) to provide for dismissal of an employee on the motion of any but the governmental unit defendant."). However, once the "governmental unit" at issue has filed a motion to dismiss those tort claims filed under § 101.106(e) against itself and its employees, "the employees shall immediately be dismissed." *See* Tex. Civ. Prac. & Rem. Code § 101.106(e). Because the district court granted the City's motion to dismiss with respect to those state-law tort claims, the court uniformly denied as moot Plaintiffs' state-law tort claims against the Individual Defendants.

(ii) Herod-Graham, who moved for summary judgment separately, then moved for summary judgment based on qualified immunity, which the district court granted, finding that Plaintiffs had failed to raise any genuine disputes of material fact as to whether they had discriminated against Deanna in violation of the Equal Protection Clause. The district court later granted Herod-Graham's motion for summary judgment based on, *inter alia*, qualified immunity, holding that Vickie's equal protection rights had not been violated.

The City moved to dismiss Plaintiffs' claims in a Rule 12(c) motion, which the district court granted in part. The City also filed two Rule 12(b)(6) motions to dismiss (which included leftover claims from the consolidated cases). Finally, the City moved for summary judgment in two separate instances. The district court granted the City's motions for summary judgment on the municipal-liability claims based on the proposition in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), that a municipality cannot be held liable if plaintiffs cannot show that a constitutional deprivation has occurred. Because the district court had already held that none of the Individual Defendants had violated Deanna's or Vickie's rights to equal protection, the court held that Plaintiffs' claims against the City could not survive. The court also granted the City's motion for summary judgment on the state-law tort claims. Finally, on separate occasions, the district court denied Plaintiffs additional discovery.

As will be discussed below, Plaintiffs attempt to appeal all of the district court's decisions. We note that

Plaintiffs fail to address or present arguments as to some of these decisions, and consequently, we consider those arguments forfeited. *See United States v. Thibodeaux*, 211 F.3d 910, 912 (5th Cir. 2000) ("It has long been the rule in this circuit that any issues not briefed on appeal are waived."); *Yohney v. Collins*, 985 F.2d 222, 224–25 (5th Cir. 1993) (one "abandon[s] [one's] arguments by failing to argue them in the body of [one's] brief"); Fed. R. App. P. 28(a)(8)(A) (the argument in appellant's brief "must contain . . . appellant's contentions and the reasons for them").

II.

We review the district court's dismissals of complaints under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim de novo. *Mowbray v. Cameron County*, 274 F.3d 269, 276 (5th Cir. 2001). "To survive a 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*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "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." *Id.* at 678. In evaluating motions to dismiss, we must view the well-pleaded facts in the light most favorable to the plaintiff. *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019); *Iqbal*, 556 U.S. at 678. And "[a]lthough for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a

factual allegation.'" *Iqbal,* 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

We review the district court's grants of summary judgment de novo, applying the same standards as the district court. *Coleman v. United States*, 912 F.3d 824, 828 (5th Cir. 2019). The court's role is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Summary judgment is proper "only if, viewing the evidence in the light most favorable to the nonmovant, '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.'" *Davenport v. Edward D. Jones & Co.*, 891 F.3d 162, 167 (5th Cir. 2018) (quoting Fed. R. Civ. P. 56(a)); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* [dispute] of *material* fact." *Anderson*, 477 U.S. at 247–48. Further, we must consider all evidence, "but may not make 'credibility assessments,' which are the exclusive province of the trier of fact." *La Day v. Catalyst Tech., Inc.,* 302 F.3d 474, 477 (5th Cir. 2002) (quoting *Dibidale, Inc. v. Am. Bank & Trust Co.*, 916 F.2d 300, 307–08 (5th Cir.1990)). Although the moving party generally bears the burden of demonstrating to the court that a genuine issue for trial does not exist, a "qualified immunity defense alters the usual summary judgment burden of proof." *Brown v. Callahan*, 623 F.3d 249, 253

(5th Cir. 2010). The burden shifts to the non-movant to show that qualified immunity does not apply. *Id.*

We review the district court's denial of discovery for abuse of discretion. *JP Morgan Chase Bank, N.A. v. DataTreasury Corp.*, 936 F.3d 251, 256 (5th Cir. 2019). "A trial court enjoys wide discretion in determining the scope and effect of discovery, and it is therefore unusual to find an abuse of discretion in discovery matters." *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 698 (5th Cir. 2017) (cleaned up). When the trial court bases its decision "on an erroneous view of the law," it has abused its discretion. *Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258, 261 (5th Cir. 2011). However, "[e]ven if a district court abuses its discretion, the reviewing court will not overturn its ruling unless it substantially affects the rights of the appellant." *JP Morgan*, 936 F.3d at 256.

III.

A. Motions to Dismiss Plaintiffs' Due Process Claims[3]

Plaintiffs contend that the district court erred in dismissing their due process claims brought against Individual Defendants in their personal capacities[4] and

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[3] We note that Plaintiffs' due process claim pursuant to § 1983 in its First Amended Complaint (including the telecommunications defendants) against Herod-Graham was dismissed for failure to allege facts that state a plausible claim. We agree with the district court.

[4] We also note that Plaintiffs' complaint does not clearly state whether suit was brought against the Individual Defendants in

the City pursuant to 42 U.S.C. § 1983. The Due Process clause of 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. But the Supreme Court has held that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). And the "failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *McClendon v. City of Columbia*, 305 F.3d 314, 324 (5th Cir. 2002) (quoting *DeShaney*, 489 U.S. at 197)). However, in "certain limited circumstances," the state can form a "special relationship" with an individual that "imposes upon the state a constitutional duty to protect that individual from dangers, including . . . private violence." *Id.* at 324. Those "certain limited circumstances" are instances where the state affirmatively exercises its powers "to restrain the individual's freedom to act on his own behalf 'through incarceration, institutionalization, or other similar restraint of

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their official capacities. The district court determined that the Individual Defendants were sued in their personal capacities, because a suit against an officer of the state in his or her official capacity is no different than "pleading an action against an entity of which an officer is an agent," and Plaintiffs' complaint already named the City. *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690 n.55 (1978). We agree with the district court's reasoning.

personal liberty.'" *Id.* (quoting *DeShaney,* 489 U.S. at 200).

Plaintiffs argue that because the City "promised Deanna" that they would increase police patrols in her neighborhood and arrest her abuser when she called, the state created a "special relationship" between Deanna and itself. However, it would be contrary to our precedent and Supreme Court precedent to recognize a "special relationship" here. The complaint does not allege that any of the Defendants affirmatively acted to restrain Deanna's personal liberty in a similar way to incarceration or institutionalization. In *Beltran v. City of El Paso*, this court held that a plaintiff grandmother whose granddaughter was killed by her father, a domestic abuser, did not show that the state had created a "special relationship" where the 911 operator who took the granddaughter's call on the date she was murdered informed the granddaughter that the police "would be sent out" but "[n]o police units immediately responded." 367 F.3d 299, 302 (5th Cir. 2004). There, the grandmother alleged that her granddaughter had relied on "falsely promised police services . . . to her detriment." *Id.* at 307. Further, the 911 operator in *Beltran* told the granddaughter to lock herself in her bathroom to avoid her father, which the grandmother alleged was a restraint on personal liberty. *Id.* The facts here involve less restraint on liberty than those in *Beltran*, where the court found no "special relationship" existed. *Id.* at 307–08. First, the alleged "promise" of additional police services and arrest of Deanna's ex-husband is removed in time from Deanna's death. Second, the 911 call-center employees did not tell Deanna to remain in her home on the day of her death,

much less tell her to barricade herself in the bathroom to avoid her attacker. There is simply no allegation in the complaint that the Defendants here restrained Deanna's liberty sufficiently to show that a "special relationship" existed.

It's true that Deanna might have a viable claim for violation of her due process rights if this circuit recognized the "state-created danger theory," which can make the state liable under § 1983 if "it created or exacerbated the danger" of private violence against an individual. *Bustos v. Martini Club Inc.*, 599 F.3d 458, 466 (5th Cir. 2010). Plaintiffs rely heavily on an out-of-circuit opinion, *Okin v. Village of Cornwall-on-Hudson Police Department*, in which the Second Circuit held that the state-created danger theory gave rise to a substantive due process violation where "police conduct . . . encourage[d] a private citizen to engage in domestic violence, by fostering the belief that his intentionally violent behavior [would] not be confronted by arrest, punishment, or police interference." 577 F.3d 415, 437 (2d Cir. 2009). But, as the district court explained, this circuit does not recognize the state-created danger theory, and we decline to do so today, despite Plaintiffs' urging that "[t]his is that case." *See Beltran*, 367 F.3d at 307 (citing *McClendon*, 305 F.3d at 327–33) ("This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability even where the question of the theory's viability has been squarely presented."); *Doe v. Columbia-Brazoria Indep. Sch. Dist.*, 855 F.3d 681, 688 (5th Cir. 2017) ("[P]anels [in this circuit] have repeatedly noted the unavailability of the [state-created danger] theory.") (cleaned up). In

sum, the district court did not err in dismissing Plaintiffs' due process claims against Defendants.

B. Motions for Summary Judgment

i. Equal Protection Claims: Individual Defendants' Qualified Immunity

Plaintiffs argue that the district court erred in granting summary judgment in favor of the Individual Defendants on Plaintiffs' § 1983 equal-protection claims based on discrimination against Deanna for her race, gender, socioeconomic background, and status as a domestic-violence victim. Plaintiffs contend that, in determining whether the Individual Defendants were entitled to qualified immunity on these claims, the district court erred by allegedly "weighing the witness' credibility" and ignoring "material fact disputes indicating Plaintiffs were treated differently from other similarly situated individuals."

"To establish an entitlement to qualified immunity, a government official must first show that the conduct occurred while he was acting in his official capacity and within the scope of his discretionary authority." *Beltran*, 396 F.3d at 303. A two-pronged inquiry then applies in a qualified-immunity analysis: "First, the court must determine whether the plaintiff has alleged a violation of a clearly established federal constitutional or statutory right. Second, the court must determine whether the official's conduct was objectively reasonable in light of the clearly established legal rules at the time of the alleged violation." *Id.*

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to

any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Generally, to state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege "that [(1) she] received treatment different from that received by similarly situated individuals and that [(2)] the unequal treatment stemmed from a discriminatory intent." *Fennell v. Marion Ind. Sch. Dist.*, 804 F.3d 398, 412 (5th Cir. 2015) (race-based equal protection claim); *see Gibson v. Tex. Dep't of Ins.*, 700 F.3d 227, 238 (5th Cir. 2012) (equal protection claim alleging discrimination against a protected class). Panels in this circuit have recognized that the "Equal Protection Clause should not be used to make an end-run around the *DeShaney* principle that there is no constitutional right to state protection for acts carried out by a private actor." *Beltran*, 396 F.3d at 304; *see Kelley v. City of Wake Village,* 264 F. App'x 437, 442 (5th Cir. 2008) (per curiam). But a governmental entity providing protective services "may not, of course, selectively deny its [] services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney*, 489 U.S. at 197 n.3.

In *Shipp v. McMahon*, this court adopted "a coherent approach for courts to review Equal Protection claims pertaining to law enforcement's practices, policies, and customs toward domestic assault cases." 234 F.3d 907, 914 (5th Cir. 2000), overruled in part on other grounds by *McClendon*, 305 F.3d at 328–29. To sustain a gender-based equal protection challenge under our precedent, a plaintiff must show "(1) the existence of a policy, practice, or custom of [government officials] to provide less

protection to victims of domestic assault than to victims of other assaults; (2) that discrimination against women was a motivating factor; and (3) that the plaintiff was injured by the policy, custom or practice." *Id.*; *see Beltran*, 367 F.3d at 304–05. "[O]fficials will be liable only for those policies, practices, customs, and conduct that are the product of invidious discrimination." *Shipp*, 234 F.3d at 914.

So, in considering qualified immunity here, our analysis turns on the first prong of a qualified immunity inquiry: Have Plaintiffs raised a fact dispute as to whether the Individual Defendants intentionally discriminated against Deanna and Vickie and treated them differently? And, with respect to the claims based on gender and status as a domestic-violence victim, were Plaintiffs injured by an existing policy, practice, or custom to provide lesser protections to victims of domestic assault, which was motivated by discrimination against women? (Defendants admit that it "was clearly established at the time of Deanna's and Vickie's [911] calls that the Fourteenth Amendment's Equal Protection Clause prohibited intentional discrimination in the provision of police protective services.")

We first note that Plaintiffs conflate our *Shipp* equal protection analysis with respect to their gender- and status as a domestic-violence victim-based claims with the equal protection analysis that this court conducts with respect to race- and socioeconomic-based equal protection claims. For example, Plaintiffs allege that the City has an "Ignore and Delay strategy as it relates to victims like Deanna," presumably meaning

"female domestic violence victims, minorities[,] and residents of neighborhoods such as Deanna's."[5] Accordingly, here, we will separate our *Shipp* and race- and socioeconomic-based equal protection analyses.

We agree with the district court in its order granting Herod-Graham's motion for summary judgment that Plaintiffs, for the purposes of our *Shipp* analysis, have "produce[d] evidence sufficient to [raise a material-fact dispute] that the City, at the time of the incident at hand, had a custom of providing less protection in 911 call taking on the bases of . . . [gender] and status as a domestic violence victim." Considering the record in the light most favorable to Plaintiffs, we recognize that the City made changes to its policies regarding response procedures for domestic violence complaints in the years following Deanna's

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[5] Plaintiffs claim this strategy is demonstrated in the City's "(i) allowing officers to 'volunteer' to investigate domestic violence disturbances or purposefully delay responding to domestic violence victims; (ii) providing a lesser degree of protection to female domestic violence victims than to victims of other assaults through not providing information required by Art. 5.04(a) of the Texas Code of Criminal Procedure; (iii) providing less protection to female victims in minority-race neighborhoods than to victims in other neighborhoods; (iv) giving lower priority to domestic violence calls than to non-domestic violence calls; (v) arriving at Deanna's residence at a time (more than 50 minutes after her [911] call) considerably in excess of the time officers respond to similarly situated persons in affluent neighborhoods without a predominantly minority population; (vi) giving less police assistance to women victims; (vii) prohibiting officers from driving fast with lights and sirens and making emergency residential entries for domestic violence claims; and (viii) allowing officers to stop for personal purchases en route to 'urgent-flagged' domestic violence calls."

death; the fact that public officials acknowledged that the City's policies were not working to protect victims of domestic violence; the evidence of misplaced paperwork and domestic violence cases that went unattended to by law enforcement; and the disciplinary actions against the call-center employees. However, on the second prong of our *Shipp* analysis, we find that Plaintiffs have failed to raise a genuine dispute of material fact as to whether discrimination against women was a motivating factor. A "discriminatory purpose" is "more than intent as volition or intent as aware of consequences. It implies that the decisionmaker . . . selected or reaffirmed a course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Kelley*, 264 F. App'x at 443 (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)). Further, "it is a truism that under current *Equal Protection Clause* jurisprudence, a showing of disproportionate impact alone is not enough to establish a constitutional violation . . . . The mere existence of disparate treatment—even widely disparate treatment—does not furnish adequate basis that discrimination was impermissibly motivated." *Id.* (quoting *Soto v. Flores*, 103 F.3d 1056, 1067 (1st Cir. 1997)). Here, although there may have been customs or policies in place that disproportionately affected female victims of domestic violence in a negative way, Plaintiffs have not shown that these customs or policies were motivated by a desire to discriminate against women. If anything, the actions and statements of the City's officials regarding domestic violence following Deanna's death demonstrate the opposite of intentional discrimination. Thus, we find that Plaintiffs do not raise material-fact

disputes as to whether Deanna's and Vickie's equal protection rights were violated based on their gender or Deanna's status as a domestic-violence victim.

Plaintiffs stress in their reply brief that the district court did not address whether there was a genuine dispute of material fact as to whether Deanna and Vickie were treated differently than similarly-situated individuals. However, this analysis applies only to Plaintiffs' race- and socioeconomic-based equal protection claims. (As discussed above, the *Shipp* analysis applies to their gender- and status as a domestic-violence victim-based claims.) Most importantly, Plaintiffs fail to recognize that, to survive summary judgment on their equal protection allegations based on their race or socioeconomic class would require raising a material-fact dispute as to whether Deanna and Vickie were "*intentionally* treated differently from others similarly situated." *Gibson*, 700 F.3d at 238 (emphasis added). So, now, with respect to Plaintiffs' race- and socioeconomic-based § 1983 claims, we consider (i) the foregoing "similarly situated" equal protection inquiry, and (ii) "if a state actor *intentionally* discriminated against [Plaintiffs] because of [their] membership in a protected class." *Id.* (emphasis added).

Plaintiffs' race-based claim seems to be premised on the conduct of April Sims, a 911 call-center employee who posted racist comments to her social media account regarding the 911 calls she received. As egregious as Sims's comments were, we do not see how Sims's conduct has any link to Plaintiffs' proposition that Deanna and Vickie were *intentionally*

discriminated against and *intentionally* treated differently because of their race. Instead, the evidence in the record shows that Sims was an outlier, who was deservedly fired from her position. Relatedly, Plaintiffs' socioeconomic-based claim seems to be based on their argument that private citizens who pay for security alarm systems receive higher priority than citizens in poorer neighborhoods (i.e., faster police responses and the like). But there is no fact dispute here, because there is no "fact" to dispute: Plaintiffs rely on Cole's statement that she didn't "have [] information" as to whether that was true.

Plaintiffs make the same type of argument with respect to their claims that the Officers responded to calls from similarly-situated Caucasian women or calls from affluent neighborhoods more quickly. For example, Plaintiffs characterize an "I do not remember" or "I'm not sure" answer as an admission from the Officers. And on both claims, Plaintiffs consistently argue that a fact dispute regarding Individual Defendants' intentional discrimination against Deanna and Vickie exists because of the "evidence" that Individual Defendants "could recognize traits of" Deanna and Vickie from the call, and that the district court made improper credibility assessments in considering the record with respect to this assertion. We recognize that the district court considered Individual Defendants' testimony that they did not know of Deanna's (or, where applicable, Vickie's) race or recognize the area in which she resided. But summary judgment requires that a party "asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials

in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence . . . of a genuine dispute." Fed. R. Civ. P. 56(c)(1). And here, Plaintiffs fail to identify evidence in the record disputing the fact that Individual Defendants were not aware of Deanna's or Vickie's race or socioeconomic background.

Thus, Plaintiffs have not satisfied prong one of our qualified-immunity analysis regarding summary judgment, which would require them to show a genuine dispute of material fact as to whether Individual Defendants violated Deanna's or Vickie's equal protection rights. The district court did not err. We also find that the district court did not make improper credibility assessments in considering the evidence in the record.

ii. Equal Protection Claim: The City

Plaintiffs contend that the district court erred in granting summary judgment in favor of the City with respect to their municipal-liability claims. The district court granted the City's motions for summary judgment based on the proposition in *City of Los Angeles v. Heller* that a municipality cannot be held liable if Plaintiffs cannot show that a constitutional deprivation has occurred. *Heller,* 475 U.S. at 799. Specifically, the City argues that *Heller* holds that, "if [a City employee] inflicted no constitutional injury on [the Plaintiffs], it is inconceivable that [the City] could

be liable." *Id*. The district court agreed with the City, noting that in a footnote in a published Fifth Circuit case, the panel wrote that "*Heller*, however, held only that if no claim is stated against officials—if plaintiff does not show any violation of his constitutional rights—then there exists no liability to pass through to the [municipality]." *Brown v. Lyford*, 243 F.3d 185, 191 n.18 (5th Cir. 2001). Plaintiffs conversely argue that this circuit has not yet confronted the question of "whether municipal liability is available if no individual liability exists." *See Carnaby v. City of Houston*, 636 F.3d 183, 189 (5th Cir. 2011). We agree with the district court that Plaintiffs are mistaken as to the City's argument: "The City does not argue that the law requires that once all personal capacity claims are dismissed, the municipal-liability claims must also be dismissed." Instead, the City argues that because we have "unambiguously determined" that the Individual Defendants did not violate Deanna's or Vickie's equal protection rights, we must affirm the City's motion for summary judgment under *Heller* as no constitutional deprivation occurred. In sum, we agree with the district court and the City that the *Brown v. Lyford* footnote is sufficient to support our holding here that, under *Heller*, because we have found no constitutional violations on the part of the Individual Defendants, the City cannot be subjected to municipal liability. *See Brown*, 243 F.3d at 191 n.18; *see also Cardenas v. San Antonio Police Dep't*, 417 F. App'x 401, 402 (5th Cir. 2011) (per curiam) (holding that, because "individual defendants did not inflict any constitutional harm on [plaintiff], the district court properly granted summary judgment for the City"); *Blair v. City of Dallas*, 666 F. App'x 337, 341 (5th Cir. 2016) (per curiam) (noting that

Heller holds that "there cannot be municipal liability under § 1983 absent an underlying constitutional violation").

C. "Class of One" Equal Protection Claims

Plaintiffs also contest the district court's dismissal of their "alternative" equal protection claim: That the Individual Defendants and the City discriminated against Deanna in violation of her constitutional rights to equal protection because of their "disdain for her as a recurrent domestic violence caller." Plaintiffs here could bring a "class of one" equal protection claim if they "allege[d] that [Deanna] [had] been intentionally treated differently from others similarly situated and that there [was] no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The district court held below that Plaintiffs failed to state a claim that Defendants violated Deanna's equal protection rights as a "class of one" because their complaint merely alleged Deanna was a member of one of the classes identified (i.e., a class based on her race, gender, socioeconomic status, and status as a domestic-violence victim), rather than alleging she was a member of a "class of one." We agree with the district court that Plaintiffs did not sufficiently plead the "class of one" theory in their complaint. *See* Fed. R. Civ. P. 8(d) ("Each allegation must be simple, concise, and direct.").

The district court noted that it did not grant Plaintiffs leave to amend on the "class of one" issue because they did not "demonstrate how a *fourth* round of pleadings [would] correct the aforementioned deficiencies because facts do not show that defendants

acted in derogation of [Deanna's] rights as an entity unto herself." Assuming *arguendo* that Plaintiffs did plead their "class of one" theory appropriately, this court has held that a plaintiff alleging he or she is a "class of one" must "present evidence that the defendant deliberately sought to deprive him [or her] of the equal protection of the laws for reasons of *a personal nature unrelated to the duties of the defendant's position*." *Kelley*, 264 F. App'x at 444 (emphasis added). In *Kelley*, the panel noted that the plaintiff victim of domestic violence was not denied her equal protection rights as a "class of one" because she could not provide evidence that the police department and 911- response department *deliberately* sought to deprive her of equal protection under the law. *Id.* Like the plaintiff in *Kelley*, Plaintiffs here do not dispute that the Individual Defendants and the City consistently responded to Deanna's past 911 calls. *Id.* Further, the plaintiff in *Kelley* was allegedly subjected to police officers' "inappropriate comments," which the panel in that case found was not enough to survive the defendant police officers' motion for summary judgment. *Id.* Here, the only defendant who had contact with Deanna is Hopkins. And the only fact that could possibly support an argument that Hopkins "singled out" Deanna is the lag in time between when Hopkins answered Deanna's call and when she notified police dispatch of Deanna's emergency. But in light of *Kelley*, this is clearly not enough to allege a "class of one" equal protection claim. And most importantly, there is no indication that Hopkins' actions were *deliberate* against *Deanna herself*.

D. State-Law Tort Claims

As noted above, the district court denied as moot Plaintiffs' state-law tort claims against the Individual Defendants, and the state-law tort claims against the Individual Defendants and the City from the original complaint were dismissed by the district court pursuant to Fed. R. Civ. P. 12(c). *See supra* note 2. However, Plaintiffs' tort claims against the City regarding Vickie's 911 call on August 19, 2012, were not addressed until the City moved for summary judgment on this issue. Plaintiffs dispute the district court's grant of summary judgment in favor of the City on the state-law tort claims only with respect to Vickie's 911 call in their briefing, so we consider their other arguments below as to the tort claims forfeited.

Plaintiffs argue that the district court erred in granting summary judgment in favor of the City on the state-law tort claims arising from Herod-Graham's conduct on August 19, 2012, i.e., two days after Deanna's death and the day her family discovered her body. The district court held that the City was entitled to governmental immunity[6] as to Plaintiffs' tort claims

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[6] The district court held that the City was entitled to "sovereign immunity" under Texas law. We recognize that the district court was referring to "governmental immunity" under Texas law here. *See Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003) ("Courts often use the terms sovereign immunity and governmental immunity interchangeably. However, they involve two distinct concepts. Sovereign immunity refers to the State's immunity from suit and liability. In addition to protecting the State from liability, it also protects the various divisions of state government, including agencies, boards, hospitals, and universities. Governmental immunity, on the other hand, protects

of negligent infliction of emotional distress, intentional infliction of emotional distress, and common-law bystander claims. *See Gipson v. City of Dallas*, 247 S.W.3d 465, 469 (Tex. App. 2008) ("Municipal corporations have traditionally been afforded some degree of governmental immunity for governmental functions, unless that immunity is waived. The operation of an emergency ambulance service is a governmental function."). Plaintiffs contend that the "non-delivery of medical services to [Plaintiffs] on August 19, 2012 was proprietary in nature or a mixture of functions." *See Tooke v. City of Mexia*, 197 S.W.3d 325, 343 (Tex. 2006) ("A municipality is not immune from suit for torts committed in the performance of its proprietary functions, as it is for torts committed in the performance of its governmental functions."). Plaintiffs state that "911 is not a part of the police," but rather, "is a separate civilian department." But they identify no evidence to support that contention. Plaintiffs further state that "EMT assistance is a proprietary function."

We agree with the district court that this argument is misguided. Texas law explicitly states that police and ambulance (i.e., EMT) services are *governmental* functions. Tex. Civ. Prac. & Rem. Code § 101.0215(a)(1), (18). The district court was correct to grant the City's motion for summary judgment with respect to the relevant state-law tort claims.

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political subdivisions of the State, including counties, cities, and school districts.").

E. Discovery[7]

Plaintiffs argue that the district court abused its discretion in denying their "Emergency Motion to Continue the City's Motion for Summary Judgment" in response to the City's second motion for summary judgment. In the motion, Plaintiffs requested additional discovery (namely, depositions of City officials) and a continuance to help "prove the City's customs and practices of discrimination against domestic violence victims such as Deanna, the City's failure to train, supervise and discipline and demonstrate how these practices were the moving forces behind the treatment Plaintiffs received from the Individual Defendants." The district court denied Plaintiffs' request on the basis that the City's motion for summary judgment was premised upon a pure issue of law—i.e., "whether the City can be held liable under 42 U.S.C. § 1983 after a court has determined that all the defendant city employees did not commit constitutional violations"—and thus, additional discovery would be futile. The district court did not abuse its discretion in denying Plaintiffs' motion here. The court correctly noted that additional discovery could be warranted if Plaintiffs' legal arguments turned out to be correct. But because the City's motion for summary judgment did not raise any issues of fact and turned on a pure issue of law, additional discovery

[7] We consider Plaintiffs' assertion that the district court abused its discretion in denying Plaintiffs' "Emergency Motion for Discovery Preservation and for Leave of Court to Conduct Discovery" (filed on October 19, 2012) forfeited because the Plaintiffs fail to adequately brief the issue.

was not necessary at that time. *See Hunt v. Johnson,* 90 F. App'x 702, 704 (5th Cir. 2004) (citing *Williams v. Phillips Petroleum Co.,* 23 F.3d 930, 937 (5th Cir. 1994)).

IV.

For the foregoing reasons, we AFFIRM the district court's judgments with respect to the decisions on appeal in full.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:12-CV-3788-N

[Filed February 6, 2019]

VICKIE COOK, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
THE CITY OF DALLAS,	)
	)
Defendant.	)
	)

FINAL JUDGMENT

By separate Order dated October 14, 2015, the Court dismissed all of Plaintiff' state-law claims against Defendant Angelia Herod-Graham, as well as Plaintiffs' due process claims against both Herod-Graham and Defendant the City of Dallas ("City") [163]. By separate Order dated August 1, 2017, the Court granted summary judgment for Herod-Graham as to Plaintiffs' equal protection claims [216]. After these orders, Plaintiffs' only remaining claims were their equal protection claims and state-law

claims against the City. By separate Order of this same date, the Court grants summary judgment for the City as to those claims. It is, therefore, ordered that Plaintiffs' claims against the City are dismissed with prejudice. Court costs are taxed against Plaintiffs. All relief not expressly granted is denied. This is a final judgment.

Signed February 6, 2019.

/s/David C. Godbey
David C. Godbey
United States District Judge

FINAL JUDGMENT – SOLO PAGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:12-CV-3788-N

[Filed February 6, 2019]

VICKIE COOK, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
THE CITY OF DALLAS,	)
	)
Defendant.	)
	)

MEMORANDUM OPINION AND ORDER

This Memorandum Opinion and Order addresses Defendant the City of Dallas's ("City") motion for summary judgment. [230]. For the reasons set forth below, the Court grants the City's motion.

I. ORIGINS OF THE DISPUTE

The Court is no stranger to the facts underlying this case. It has detailed the story of Deanna Cook and her family on several occasions. *See, e.g.*, August 1, 2017 Order 1-3, [216] ("MSJ Order"). Only two sets of claims

remain in this dispute: (1) Plaintiffs' municipality liability claims against the City; and (2) Plaintiffs' various tort claims against the City. The City now moves for summary judgment on both of these claims.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Courts "shall grant summary judgment 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." FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In making this determination, courts must view all evidence and draw all reasonable inferences in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The moving party bears the initial burden of informing the court of the basis for its belief that there is no genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

When a party bears the burden of proof on an issue, she "must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in [her] favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis omitted). When the nonmovant bears the burden of proof, the movant may demonstrate entitlement to summary judgment by either (1) submitting evidence that negates the existence of an essential element of the nonmovant's claim or affirmative defense, or (2) arguing that there is no evidence to support an essential element of the nonmovant's claim or affirmative defense. *Celotex*, 477 U.S. at 322–25.

Once the movant has made the required showing, the burden shifts to the nonmovant to establish that there is a genuine issue of material fact such that a reasonable jury might return a verdict in its favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). Moreover, "[c]onclusory allegations, speculation, and unsubstantiated assertions" will not suffice to satisfy the nonmovant's burden. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc). Indeed, factual controversies are resolved in favor of the nonmoving party "'only when an actual controversy exists, that is, when both parties have submitted evidence of contradictory facts.'" *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999) (quoting *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995)).

III. THE COURT GRANTS DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

A. Plaintiffs' Municipal Liability Claim Fails Because There is No Underlying Constitutional Violation

Plaintiffs' allege that the City has a custom of discriminating in the provision of 9-1-1 services on the basis of "race, gender, socioeconomic, locality, and domestic violence classifications" that amounts to municipal liability under section 1983. Pls.' Br. in Supp. of Resp. to City of Dallas's Mot. for Summ. J. 21 [233] ("Resp."). For this claim to succeed, Plaintiffs must show that: "(1) an official policy, (2) promulgated by [a] municipal policymaker (3) was the moving force behind the violation of a constitutional right." *Peterson*

v. City of Fort Worth, 588 F.3d 838, 847 (5th Cir. 2009). Importantly, "if the plaintiff does not show any violation of his constitutional rights then there exists no liability to pass through to the [municipality]." *Brown v. Lyford*, 243 F.3d 185, 191 n.18 (5th Cir. 2001) (citing *City of L.A. v. Heller*, 475 U.S. 796, 799 (1986)).

Even if all of Plaintiffs' allegations about the City's policies and customs were true, this Court has already determined that Plaintiffs suffered no underlying constitutional violation. Indeed, by previous Order, the Court held that it is beyond reasonable dispute that 9-1-1 dispatcher Angelia Herod-Graham did not discriminate or act with the intent to discriminate against Plaintiffs. MSJ Order at 6-10. This was the precise issue the Court wrestled with earlier in this litigation. March 15, 2016 Order 8, [175]. It held that *Heller* applied to block the Plaintiffs' claims against the City when all of the claims against individual defendants were dismissed at the motion-to-dismiss or summary judgment stage for lack of evidence establishing a constitutional violation. *Id*. The Court sees no reason to change course now. Accordingly, because there was no underlying constitutional violation, the Court holds the City cannot be held liable under section 1983.

B. Plaintiffs' Various Tort Claims Fail

The Court agrees with the City and construes the various state law tort claims Plaintiffs' raise in their complaint as: negligent infliction of emotional distress ("NIED"), intentional infliction of emotional distress ("IIED"), section 1983 bystander claims, and common law bystander claims. Each of these claims fails.

Primarily, the City has sovereign immunity that shields it from any of Plaintiffs' tort claims. Plaintiffs first argue that the City lacks this protection because it was not acting in a purely governmental function, as required by Texas law. Resp. at 43. The Court disagrees. The Texas Civil Practice and Remedies Code and Texas case law explicitly state that police and ambulance services are governmental Functions. TEX. CIV. PRACTICE AND REM. CODE §101.0215(a)(1), (18); *Gipson v. City of Dallas*, 247 SW.3d 465, 469 (Tex. App. — Dallas 2008, pet. denied). The Court further holds that the City retained this immunity under the Texas Tort Claims Act ("TTCA"). Section 101.021(2) of the TTCA strips a municipality of its immunity for claims caused by a condition or use of tangible property. Plaintiffs argue that this section applies here because Herod-Graham used the City's Incident Editor, Premise History computer databases, and telephone equipment. Resp. at 44-45. But for section 101.021(2) to apply, the use of the City's property must be the proximate cause of the injury. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 726 (Tex. 2016). This requires:

> both "cause in fact and foreseeability." For a condition of property to be a cause in fact, the condition must "serve as a 'substantial factor in causing the injury . . . .'" When a condition or use of property merely furnishes a circumstance "that makes the injury possible," the condition or use is not a substantial factor in causing the injury. To be a substantial factor, the condition or use of the property "must actually have caused the injury." "This nexus requires more than mere involvement

> of the property . . . ." Thus, the use of property that simply hinders or delays treatment does not "actually cause the injury" and does not constitute proximate cause of an injury.

Id. (citations omitted). This is precisely what happened here. Just because Herod-Graham used the City's property does not mean that it was the proximate of the injury. There is nothing indicating it was. Accordingly, the Court holds that the City retains its immunity against all of Plaintiffs' tort claims.

Even if the City did not retain its immunity, however, each of Plaintiffs' different tort claims fail for independent reasons. First, Plaintiffs' NIED claim should be dismissed because NIED is not a cognizable claim under Texas law. *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993). Second, the TTCA specifically states that section 101.021(2) does not alter the City's immunity to claims of intentional torts like IIED. TEX. CIV. PRACTICE AND REM. CODE §101.057(2); *Graham v. Dallas Area Rapid Transit*, 288 F. Supp. 3d 711, 748 (N.D. Tex. 2017) (citing *City of Watauga v. Gordon*, 434 S.W.3d 586, 589 (Tex. 2014)). Third, because the Court has already held that the alleged deprivation of rights that Plaintiffs state forms the basis of their section 1983 bystander claim was not a deprivation of rights at all, the claim lacks any basis. Resp. at 47; MSJ Order at 6-10. Finally, as the Court has already stated, the Plaintiffs' common law bystander claim fails because "before a bystander may recover, he or she must establish that the defendant has negligently inflicted serious or fatal injuries on the *primary victim*. Plaintiffs do not, as they cannot, allege that

Herod-Graham inflicted serious or fatal injuries on Deanna Cook." October 14, 2015 Order 12, n.8 [163]. Thus, even if the City did not retain its immunity, the Court would still dismiss all of Plaintiffs' tort claims on summary judgment.

CONCLUSION

For the reasons stated above, the Court grants the City's motion for summary judgment.

Signed February 6, 2019.

/s/David C. Godbey
David C. Godbey
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:12-CV-3788-N

[Filed August 1, 2017]

VICKIE COOK, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
THE CITY OF DALLAS, *et al.*,	)
	)
Defendant.	)
	)

ORDER

This Order addresses Defendant Angelia Herod-Graham's motion for summary judgment [190]. Because Herod-Graham is entitled to qualified immunity, the Court grants the motion.

I. ORIGINS OF THE MOTION

This case arises out of Defendants the City of Dallas ("the City") and Herod-Graham's response to 9-1-1 calls from Plaintiffs Deanna Cook and Vickie Cook. On August 17, 2012, Deanna Cook, a domestic violence

victim, called 9-1-1 for assistance while an intruder attacked her inside of her home. Nearly fifty (50) minutes after Deanna Cook placed her 9-1-1 call, two officers arrived at Deanna Cook's home. The officers knocked on the door and called Deanna Cook's cellular phone before leaving. On August 19, 2012, Plaintiffs Vickie Cook, Karletha Cook-Gundy, N.W., and A.W. (respectively, Deanna Cook's mother, sister, and daughters) (collectively, "Plaintiffs") went to Deanna Cook's home to check on her, at which point they noticed suspicious conditions at the house. Vickie Cook called 9-1-1 seeking help in entering her daughter's home. Herod-Graham was the emergency call-taker who received Vickie Cook's call. Rather than immediately send officers to Deanna Cook's home, Herod-Graham repeatedly told Vickie Cook that she must first contact the jails and local hospitals to look for Deanna Cook. Plaintiffs eventually decided to break into the home, at which point they found Deanna Cook's dead body half-in and half-out of the bathtub, floating atop overflowing water. Sometime after this incident, the City fired Herod-Graham.

Plaintiffs brought claims for violation of equal protection and due process under the Fourteenth Amendment, and a number of state law claims, against Tonyita Hopkins, Kimberley Cole, Johnnye Wakefield, Yaminah Shani Mitchell, Officer Julie Menchaca, Officer Amy Wilburn, Herod-Graham, the City of Dallas Police Department, and the City in Case No. 3:12-cv-03788-N ("*Cook I*"). The Court has dismissed these claims. Plaintiffs also brought claims against T-Mobile USA, Inc.; MetroPCS Communications Inc.; Samsung Electronics Co Ltd; Samsung

Telecommunications America LLC; the City; and Herod-Graham in Case No. 3:14-cv-02907-P ("*Cook II*"). On September 25, 2015, the Court granted consolidation of *Cook I* and *Cook II*. The Court has dismissed Plaintiffs' claims against the telecommunications defendants.

On March 15, 2016, the Court granted summary judgment in favor of the City on Plaintiffs' *Monell* claims arising from Deanna Cook's August 17, 2012 9-1-1 call. Plaintiffs' remaining claim is that the City and Herod-Graham unconstitutionally deprived the Plaintiffs of equal protection of the law "in the refusal to prioritize and respond quickly to the call" from Vickie Cook, which was the consequence of an alleged custom of discriminating in the treatment of 9-1-1 calls on the bases of race, gender, socioeconomic background, and status as a domestic violence victim. Plaintiffs allege that Herod-Graham either acted independently in depriving Plaintiffs of their constitutional rights, or alternatively that Herod-Graham followed the discriminatory customs and policies of the City.

Herod-Graham now moves for summary judgment, arguing that she is protected by qualified immunity. Plaintiffs oppose the motion.

II. THE LEGAL STANDARDS

A. The Summary Judgment Standard

Courts "shall grant summary judgment 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." FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247

(1986). In making this determination, courts must view all evidence and draw all reasonable inferences in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The moving party bears the initial burden of informing the court of the basis for its belief that there is no genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

When a party bears the burden of proof on an issue, "he must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). When the nonmovant bears the burden of proof, the movant may demonstrate entitlement to summary judgment either by (1) submitting evidence that negates the existence of an essential element of the nonmovant's claim or affirmative defense, or (2) arguing that there is no evidence to support an essential element of the nonmovant's claim or affirmative defense. *Celotex*, 477 U.S. at 322–25. Once the movant has made this showing, the burden shifts to the nonmovant to establish that there is a genuine issue of material fact so that a reasonable jury might return a verdict in its favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). Moreover, "[c]onclusory allegations, speculation, and unsubstantiated assertions" will not suffice to satisfy the nonmovant's burden. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc). Indeed, factual controversies are resolved in favor of the nonmoving party "'only when an actual controversy exists, that is, when both parties have

submitted evidence of contradictory facts.'" *Olabisiomotosho v. City of Hous.*, 185 F.3d 521, 525 (5th Cir. 1999) (quoting *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995)).

B. The Qualified Immunity Standard

"Qualified immunity is a defense available to public officials performing discretionary functions ' . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.'" *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1024 (5th Cir. 1988) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). This doctrine balances two interests: "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). "Because qualified immunity is designed to shield from civil liability 'all but the plainly incompetent or those who knowingly violate the law,'" denial of qualified immunity is appropriate only in rare circumstances. *Brady v. Ford Bend Cty.*, 58 F.3d 173, 173–74 (5th Cir. 1995) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Once a defendant raises the defense of qualified immunity, the plaintiff bears the burden to demonstrate that it does not apply. *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009); *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002). In the summary judgment context, courts "no longer [permit the plaintiff to] rest on the pleadings" and,

instead, consider the evidence in the record in the light most favorable to the plaintiff. *McClendon*, 305 F.3d at 323 (citing *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996)).

In accordance with the *Saucier* test, the plaintiff must demonstrate a genuine issue of material fact: "(1) that the defendants violated the plaintiff's constitutional rights and (2) that the violation was objectively unreasonable." *Zarnow v. City of Wichita Falls*, 500 F.3d 401, 407 (5th Cir. 2007) (citing *Fraire v. City of Arlington*, 957 F.2d 1268, 1273 (5th Cir. 1992)). Stated more simply, to resolve a public official's qualified immunity claim, a court must consider two factors. First, has the plaintiff shown a violation of a constitutional right? *Saucier v. Katz*, 533 U.S. 194, 201 (2001). And, second, was the right "clearly established" at the time of the public official's alleged misconduct? *Id.*

"The judges of the district courts . . . [may] exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 235. "But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014).

III. HEROD-GRAHAM IS ENTITLED TO SUMMARY JUDGMENT

Because Plaintiffs have not produced summary judgment evidence sufficient to rebut Herod-Graham's

defense of qualified immunity, Herod-Graham is entitled to summary judgment. Plaintiffs argue that Herod-Graham violated 42 U.S.C. § 1983 by refusing to prioritize and respond quickly to Vickie Cook's 9-1-1 call due to an alleged custom of discriminating in the treatment of 9-1-1 calls on the bases of race, gender, socioeconomic background, and status as a domestic violence victim.

"Section 1983 provides a cause of action against any person who, acting under color of state law, abridges rights created by the Constitution and the law of the United States." *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 375 (E.D. La. 1997) (citing ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.1 (2d ed. 1994)). "To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class." *Williams v. Bramer*, 180 F.3d 699, 705 (5th Cir. 1999). Thus, a plaintiff must demonstrate that he or she has been treated differently due to membership in a protected class, and such plaintiff must also allege that such unequal treatment stemmed from a discriminatory intent. *See Hampton Co. Nat. Sur., LLC v. Tunica County, Miss.*, 543 F.3d 221, 228 (5th Cir. 2008).

A governmental entity providing protective services "may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 n.3 (1989). However, for a plaintiff to sustain a gender-based equal protection claim, she must show:

"(1) the existence of a policy, practice, or custom of law enforcement to provide less protection to victims of domestic assault than to victims of other assault; (2) that discrimination against women was a motivating factor; and (3) that the plaintiff was injured by the policy, custom, or practice." *Shipp v. McMahon*, 234 F.3d 907, 914 (5th Cir. 2000).

Herod-Graham argues that her discretionary actions were objectively reasonable, and that the record is devoid of any facts to suggest that her actions were the result of an intentional discriminatory motive. She claims that she followed the training she received as a City employee, and that she then used her reasonable judgment to respond to what she classified as a missing person 9-1-1 call. Herod-Graham claims that she did not recognize Vickie Cook's voice to be that of an African-American, that she did not know that Deanna Cook was a domestic violence victim, and that she did not ascertain that Deanna Cook's address was located in a socioeconomically deprived neighborhood. Accordingly, Herod-Graham claims that qualified immunity protects what she claims were her objectively reasonable actions.

In *Beltran v. City of El Paso*, 367 F.3d 299 (5th Cir. 2004), the Fifth Circuit held that where an appellee failed to state a violation of clearly established equal protection or due process rights against a 9-1-1 operator, the operator was entitled to the defense of qualified immunity. In that case, a young woman called 9-1-1 to report that her father was drunk and potentially violent. That same young woman had a few months earlier called 9-1-1 to report that her father

was drunk and becoming abusive to her and her mother. The 9-1-1 operator coded the call as a family violence assault, a lower priority level than an injury in progress, and no police units immediately responded. The 9-1-1 operator did not include the young woman's statements that she feared for her life or the prior report of the father's domestic violence. The father shot and killed the young woman and her mother. The Court held that even if the City's classification policy may have had an adverse disparate impact on female victims of domestic violence, the appellee made no showing that the City assigned a lower level priority code to 9-1-1 family violence assault calls as the result of an effort to discriminate against women. Without such evidence, the Fifth Circuit held that the 9-1-1 operator's actions were reasonable and that she designed her questions to assess the situation at hand. Further, the Fifth Circuit noted that there was no evidence that the police would have arrived in time to save the lives of the young woman or her mother.

Here, Plaintiffs produce evidence sufficient to show that the City, at the time of the incident at hand, had a custom of providing less protection in 9-1-1 call taking on the bases of race, socioeconomic background, or status as a domestic violence victim. Plaintiffs provide this evidence in the form of citizen complaints, statements from the Mayor of Dallas, statements from other former 9-1-1 call operators, confirmed incidents of lost files and misplaced paperwork involving family violence, subsequent changes to City policies, and a review of the City's response times to 9-1-1 priority calls. However, this evidence is only sufficient to demonstrate a discriminatory purpose if it "implies

that the decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effect on an identifiable group." *Priester v. Lowndes County*, 354 F.3d 414, 424 (5th Cir. 2004). A discriminatory purpose is "more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979). Plaintiffs, however, have not shown that the City's custom existed for the purpose of discriminating against an identifiable group. Even taking as true Plaintiffs' assertions that statistics show that City has a custom of giving a different and more rapid response to certain 9-1-1 callers than to others, that the Mayor of Dallas has pointed out the City's flaws in its responses to domestic violence victims and condemned the handling of Plaintiffs' 9-1-1 calls, and that the City has mishandled domestic violence cases and paperwork, none of this evidence demonstrates that the City or Herod-Graham acted *for the purpose* of causing an adverse effect upon an identifiable group. *See, e.g., Shipp*, 234 F.3d at 914 ("While statistical evidence showing disproportional impact is probative on the issue of gender-based motivation, such evidence without a showing of intent is insufficient to sustain an Equal Protection claim."); *see also Kelley v. City of Wake Village, Texas*, 264 Fed.Appx. 437, 443 (5th Cir. 2008) ("The mere existence of disparate treatment – even widely disparate treatment – does not furnish adequate basis that discrimination was [impermissibly]

motivated.") (quoting *Soto v. Flores*, 103 F.3d 1056, 1057 (1st Cir. 1997)).

Further, an equal protection plaintiff "must show that her injuries are the result of law enforcement 'inaction or conduct pursuant to invidious policies.'" *Beltran*, 367 F.3d at 306 (citing *Shipp*, 234 F.3d at 914). Plaintiffs cannot show that Herod-Graham acted pursuant to any of the City's allegedly invidious policies. Herod-Graham, in her deposition testimony, states that she did not know what part of Dallas Vickie Cook called from, and that she could not ascertain the race of Vickie Cook. *See* App. To Def. Angelia Herod-Graham's Br. in Supp. of Mot. for Summ. J., Ex. A at 16–17 [189-1]. Further, Herod-Graham states that she did not know the reasons for Deanna Cook's previous 9-1-1 calls (i.e. that Deanna Cook was a domestic violence victim). *See* Def. Angelia Herod-Graham's Reply Br. in Supp. of Mot. for Summ. J. 6 [215]. Though Plaintiffs provide evidence to show that Herod-Graham had access to information in the Incident Editor and Premise History sufficient to show demographics and the nature of calls, such evidence does not show that Herod-Graham actually accessed that information. That Herod-Graham was aware that the police went to Deanna Cook's home two days prior is not enough to rebut Herod-Graham's statement that she knew no more than that fact.

Plaintiffs have not met their burden to show that Herod-Graham violated their equal protection rights. Thus, Plaintiffs have not rebutted Herod-Graham's assertion of qualified immunity.

CONCLUSION

Based on the forgoing reasons, the Court grants Herod-Graham's motion for summary judgment.

Signed August 1, 2017.

/s/David C. Godbey
David C. Godbey
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION NO. 3:12-CV-3788-P

[Filed August 27, 2015]

VICKIE COOK, Individually and as Natural Mother to DEANNA COOK, *et al.,*	)
Plaintiffs,	)
v.	)
THE CITY OF DALLAS, *et al.,*	)
Defendants.	)

ORDER

Now before the Court are four motions for summary judgment based on qualified immunity filed by Defendants Tonyita Hopkins, Johnnye Wakefield, Yaminah Shani Mitchell, Julie Menchaca, and Amy Wilburn (collectively, the "Individual Defendants").

On November 7, 2014, Defendant Hopkins filed her motion for summary judgment. Doc. 134. Defendant Wakefield filed her motion on November 14, 2014. Doc.

140. That same day, Defendant Mitchell filed a motion for summary judgment. Doc. 142. Defendants Julie Menchaca and Amy Wilburn (collectively "the Officers") also filed a joint motion for summary judgment on November 14, 2014. Doc. 144.

Plaintiffs filed a response addressing the motions collectively on November 28, 2014. Doc. 147. Defendants filed separate replies on December 12, 2014. Doc. 150 (Hopkins's reply); 151 (the Officers' reply); 152 (Mitchell's reply); 153 (Wakefield's reply).

After reviewing the briefing, the evidence, and the applicable law, the Court GRANTS the Individual Defendants' Motions for Summary Judgment based on qualified immunity.

I. Background

This lawsuit is about the City of Dallas's response to a 9-1-1 call that failed to prevent Deanna Cook's ("Deanna") murder. Deanna had a history of calling the police to report domestic abuse. On August 17, 2012, Tonyita Hopkins, a 9-1-1 call center employee, answered a call from Deanna. At the time of Deanna's call, Johnnye Wakefield was filling in for call center supervisor Kimberley Cole. Wakefield assisted Hopkins in handling and classifying Deanna's call.

Deanna called 9-1-1 at 10:55 a.m. on August 17, 2012. However, Deanna never spoke to Hopkins. Hopkins only heard sounds in the background of Deanna screaming and pleading with an intruder who had been her ex-husband. Despite being unable to communicate with the caller, Hopkins requested police dispatch for the active disturbance and stayed on the

line. She assigned a call Signal 6X, which denotes a major disturbance and is a Priority II urgent call. At 11:01 a.m., the intruder told Deanna that he was going to kill her. After the disturbance appeared to have ended and the line remained silent for ten minutes, Wakefield allegedly advised Hopkins to disconnect and call back. Hopkins followed Wakefield's advice and disconnected the call at 11:11 a.m., but her attempt to call back was met by Deanna's voicemail.

According to Plaintiffs, from listening to the call, Hopkins knew that Deanna was a minority caller who was calling from a socioeconomically deprived neighborhood about a domestic dispute. Also, Plaintiffs believe that at some point Hopkins discovered that Deanna had a history of reporting domestic violence. Following the dispatch, Hopkins did not upgrade the call to a Priority I emergency call or follow up to ensure that police dispatch actually sent officers to Deanna's residence.

At 11:02 a.m., Yaminah Mitchell, a relief police dispatcher in charge of assigning and broadcasting police calls according to priority, was made aware of Deanna's call. She was also aware that police had an address for Deanna's call and that it had been marked "disturbance still heard in the background." Because no officers were currently available, Mitchell placed the call in queue with other 9-1-1 calls. Mitchell did not assign the call until 11:29 a.m. when that Officers Julia Menchaca and Amy Wilburn first became available. At that time, the Officers volunteered to respond to the call. According to Plaintiffs, Mitchell knew that Deanna was a minority caller who was calling from a

socioeconomically deprived neighborhood about a domestic dispute and at some point discovered that Deanna had a history of reporting domestic violence.

When the Officers volunteered to take the call at 11:29 a.m., they were fourteen minutes away from Deanna's residence. Despite this, the Officers stopped on the way to buy water at a convenience store. The stop lasted two minutes, and the Officers arrived sixteen minutes after they were assigned the call. Plaintiffs argue the Officers knew that Deanna was a minority calling from a socioeconomically deprived neighborhood about what appeared to be a domestic dispute and that she had previously reported claims of domestic violence and stalking.

The Officers knocked on the door, and, when there was no answer, had someone call Deanna's cell phone. The call went to voicemail. The Officers did not scale Deanna's fence or go to the rear of Deanna's residence due to the presence of at least one dog. Because the Officers did not see anything through the windows, did not hear any noise indicating a disturbance, and were unable to reach Deanna on the number she called 9-1-1 from, the Officers left Deanna's residence without further investigation.

Two days later, Deanna's two daughters, her mother, and her sister went to Deanna's residence after Deanna did not show up for church. At Deanna's residence, the family noticed that Deanna's dogs were barking frantically and that water was leaking from the house. After Deanna did not respond to knocks on her door or calls to her cell phone, her mother, Vickie, called 9-1-1. After receiving no help in response to their

call, the family then decided to force their way into the residence and ultimately discovered Deanna's lifeless body in her bathtub, the victim of an apparent homicide.

In the aftermath of the incident, Hopkins was disciplined for her actions. Dallas Police Chief David Brown suspended Hopkins, allegedly admitting that Hopkins' obvious failure cost Deanna her life.

On March 22, 2013, Plaintiffs filed their Second Amended Complaint against Hopkins, Wakefield, Mitchell, and the Officers (collectively, the "Individual Defendants"), as well as the City of Dallas. The Court subsequently dismissed each of Plaintiffs' claims against the Individual Defendants except for their claims arising out of the Equal Protection Clause of the Fourteenth Amendment for discrimination based on race, gender, socioeconomic background, and status as domestic violence victim. *See* Doc. 101 (order regarding the Officers); Doc. 108 (order regarding Hopkins); Doc. 109 (order regarding Wakefield); Doc. 110 (order regarding Mitchell). Now, the Individual Defendants move for summary judgment based on qualified immunity.

II. Legal Standard & Analysis

a. Motion for Summary Judgment on Qualified Immunity

Under Federal Rule of Civil Procedure 56, courts "grant summary judgment 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." Fed. R. Civ. P. 56(a). "[T]he substantive law will

identify which facts are material." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment. Fed. R. Civ. P. 56(c); *see Anderson,* 477 U.S. at 249-50. This means that "conclusory statements, speculation, and unsubstantiated assertions cannot defeat a motion for summary judgment." *RSR Corp. v. Int'l Ins. Co.,* 612 F.3d 851, 857 (5th Cir. 2010). Furthermore, a court has no duty to search the record for evidence of genuine issues of material fact. Fed. R. Civ. P. 56(c)(1) & (3); *see Ragas v. Tenn. Gas Pipeline Co.,* 136 F.3d 455, 458 (5th Cir. 1998). Where the record discredits a Plaintiff's description of the facts, the Supreme Court concluded that the Court should consider "the facts in the light depicted by the videotape." *Scott v. Harris,* 550 U.S. 372, 372, (2007).

The moving party generally bears the burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial and of identifying those portions of the record that demonstrate such absence. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). However, a "qualified-immunity defense alters the usual summary judgment burden of proof." *See Brown v. Callahan,* 623 F.3d 249, 253 (5th Cir. 2010). When governmental employees assert such defense in a motion for summary judgment, they need only assert the defense in good faith. *See Gates v. Tex. Dep't of Protective & Regulatory Servs.,* 537 F.3d 404, 419 (5th Cir. 2008). They have no burden

to put forth evidence. *Beck v. Tex. State Bd. of Dental Exam'rs,* 204 F.3d 629, 633-34 (5th Cir. 2000). The burden then shifts to the non-movant to show that the defense does not apply. *See Brown,* 623 F.3d at 253.

"Qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Winston v. City of Shreveport,* 390 F. App'x 379, 383 (5th Cir. 2010) (quoting *Pearson v. Callahan,* 555 U.S. 223, 231 (2009)); *see also Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The "principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." *Pearson,* 555 U.S. at 223. Qualified immunity recognizes that government officials may "make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law." *Messerschmidt v. Millender,* 132 U.S. 1235, 1244 (2012) (citations omitted).

The Supreme Court has established a two-step analysis to determine whether a police officer is entitled to qualified immunity. *Hope v. Pelzer,* 536 U.S. 730, 736 (2002); *see also Kinney v. Weaver,* 367 F.3d 337, 356 (5th Cir. 2004). The Court must decide "whether plaintiff's allegations, if true, establish a constitutional violation." *Id.* The Court takes the facts in the light most favorable to Plaintiff to determine whether the alleged conduct amounts to a constitutional violation. *See Singleton v. Darby,* No. 14–40040, 2015 WL 2403430, at *1-17 (Tex. May 21,

2015). The Court must also ask "whether that right was 'clearly established' at the time of the defendant's alleged misconduct." *Pearson,* 129 U.S. at 816 (citing *Saucier v. Katz,* 533 U.S. 194, 201(2001)). A court has discretion to decide which of the two prongs of the qualified immunity analysis should be addressed first "in light of the circumstances in the particular case at hand." *Id.* at 818.

i. Plaintiffs' Equal Protection Claims

Plaintiffs' only remaining claim against each of the Individual Defendants is for violating the Equal Protection Clause of the Fourteenth Amendment by discriminating against Deanna based on her race, gender, socioeconomic background, and status as domestic violence victim. *See* Doc. 101; 108; 109; 110. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "The Equal Protection Clause directs that persons similarly situated should be treated alike." *Williams v. Bramer,* 180 F.3d 699, 705 (5th Cir. 1999) (citing *Plyler v. Doe,* 457 U.S. 202, 216 (1982)). "To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege either that (a) a state actor intentionally discriminated against [her] because of membership in a protected class[,] or (b) [she] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Gibson v. Tex. Dep't of Ins.–Div. of Workers' Comp.,* 700 F. 3d 227, 238 (5th Cir. 2012) (citations omitted).

If a governmental entity provides protective services, it "may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney v. Winnebago County Dep't of Soc. Servs.,* 489 U.S. 189, 197 n.3 (1989). In *Shipp v. McMahon,* 234 F.3d 907, 914 (5th Cir. 2000), *overruled in part on other grounds by McClendon v. City of Columbia,* 305 F.3d 314, 328-29 (5th Cir. 2002), the Fifth Circuit addressed such officer inaction by examining "whether a domestic abuse victim's complaint against a law enforcement agency and its officials for failure to effectuate an arrest, and for their policies, practices, and customs that discriminate against victims of domestic assault constitute intentional discrimination against women, and thus is cognizable under the Equal Protection Clause." *Shipp,* 234 F.3d at 913. There, the Court "held that in order for a plaintiff to sustain a gender-based equal protection claim, she must show: '(1) the existence of a policy, practice, or custom of law enforcement to provide less protection to victims of domestic assault than to victims of other assault; (2) that discrimination against women was a motivating factor; and (3) that the plaintiff was injured by the policy, custom, or practice.'" *Kelley v. City of Wake Village, Tex.,* 264 F. App'x 437, 443 (5th Cir. 2008) (quoting *Shipp,* 234 F.3d at 914). The Court also held that "law enforcement officials will be liable only for those policies, practices, customs, and conduct that are the product of invidious discrimination." *Shipp,* 234 F.3d at 914.

In *Beltran v. City of El Paso,* 367 F.3d 299 (5th Cir. 2004), the Fifth Circuit applied the same three element

test when examining a 9-1-1 operator's motion for summary judgment based on qualified immunity. There, the Fifth Circuit reversed the district court's denial of qualified immunity because the plaintiff had failed to "raise triable issues concerning intentional gender-based discrimination or causation." *Id.at* 305. The Court began by noting the weakness of its *arguendo* assumption that the city's policy of classifying "family violence assault" as lower priority than "injury to a child in progress" had an adverse disparate impact on female victims of domestic violence. *Id.* The Court went on to find that the plaintiff had brought no evidence indicating discrimination against women was the motivating factor behind the policy. *Id.* ("even where a plaintiff brings forth statistical evidence showing disproportionate impact that is probative on the issue of gender-based motivation, such evidence without a showing of intent is insufficient to sustain an equal protection claim" (citations omitted)). Finally, the Fifth Circuit found no causation because the plaintiff provided "no evidence that the police would have responded any more quickly if [the 911 operator] had coded the call as an injury to a child in progress." *Id.* at 306.

Here, Plaintiffs begin by arguing that they "have offered evidence that the custom practiced by the City of Dallas and its agents is to classify domestic violence complaints by gender and race and to give less priority to domestic violence calls – the Ignore and Delay custom." Doc. 148 at 32. However, Plaintiffs fail to cite the record or point to any evidence supporting this assertion. *Cf. id.* Instead, Plaintiffs argue that "the

'ignore and delay' actions of each defendant came 'after' defendants discovered that Ms. Cook was a recurrent domestic violence victim from a depressed predominately minority neighborhood, who had been abused by a Black male." *Id.* (citing no evidence in support). Based on this timing, Plaintiffs believe "a jury could reasonably infer that defendants had a purpose or intent of discriminating against Ms. Cook based on her classifications that they had recently uncovered." *id.*

1. Hopkins

Plaintiffs argue that Hopkins acted improperly by (1) holding Deanna's call for 17 minutes while not upgrading the call to require the officers to use lights and sirens, (2) hanging up the phone call, (3) providing less assistance to female victims in high crime and minority race neighborhoods, (4) giving lower priority to domestic violence calls, and (5) not instructing the officers to use lights and sirens or make an emergency entry to the residency. Doc. 148 at 34-35. However, Plaintiffs fail to direct the Court to any evidence indicating that Hopkins's actions were discriminatory or motivated by Deanna's race, gender, socioeconomic background, or status as a domestic violence victim. Plaintiffs cannot maintain a claim simply because Hopkins knew of Deanna's race, gender, socioeconomic background, and status as a domestic violence victim. Plaintiffs must show that Hopkins acted in a discriminatory manner based on that knowledge.

Plaintiffs insist that Hopkins acted unreasonably by not upgrading the call to Priority I which would require the officers to use lights and sirens. Doc. 148 at 35.

Under the City of Dallas's prioritization system, a call can be properly categorized as a Priority I call if it is an emergency that includes persons in danger or certain family violence calls. Doc. 146-2 at 12. Under the system, a call should be classified as Priority I if it involves a disturbance with potential violence or criminal assault. *Id.* In this case, evidence suggests that Hopkins heard Deanna note that her assailant broke down her door and heard the assailant say several times that he was going to kill Deanna. Doc. 149-1 at 22-27. Based on this information, there is a question of fact regarding whether Hopkins should have upgraded the call to Priority I or if she appropriately classified it as Priority II. Moreover, Plaintiffs point out that the Dallas Police Department issued a letter disciplining Hopkins for failing to "enter complete critical information" in the call sheet. Doc. 148 at 37 (citing Doc. 149-2 at 42). In the initial incident report, Hopkins noted that there was an active disturbance in the background where a female was screaming "help, please, stop it red." Doc. 146-1 at 14. However, Hopkins never reported to dispatch that Deanna's assailant threatened to kill her or broke down the door. These omissions may have resulted in dispatch or the responding officers not appropriately grasping the urgency of the situation later in the process. Therefore, a reasonable jury could find that Hopkins acted unreasonably.

However, even considering the evidence in light most favorable to Plaintiffs, Plaintiffs' first argument fails because they have brought no evidence indicating that Hopkins's actions were motivated by a discriminatory intent. *Cf.* Doc. 148 at 35-37. First,

Hopkins's discipline letter does not suggest that Hopkins acted with a discriminatory intent by not upgrading the priority of the call. Moreover, the evidence indicates that Hopkins did not even know about the socioeconomic status of Deanna's residence, Deanna's race, or Deanna's status as a domestic violence victim. While Hopkins could have accessed information about Deanna through the incident editor, Hopkins testified that she did not access that information and had no reason to access that information. Doc. 149-1 at 14. In fact, nothing indicates that Hopkins did access the information. Therefore, Plaintiffs' first argument fails because they have not raised a fact issue regarding whether Hopkins was motivated by a discriminatory intent. Plaintiffs' second argument fails because Hopkins was ordered to hang up the phone by her supervisor. Hopkins had already waited through nearly ten minutes of silence before obeying her superior's order. Doc. 149-1 at 26-27. No evidence suggests that the decision to hang up was based on a discriminatory motive. Plaintiffs' third and fourth arguments fail because they are unsupported and conclusory. Finally, Plaintiffs' fifth argument fails for the same reason as their first argument. The evidence shows that Hopkins did not have the power to ensure police were sent in a specific manner. *See* Doc. 146-7 at 54. Hopkins only had the power to upgrade the call. As discussed, Plaintiffs have not shown that Hopkins intentionally discriminated against Deanna by failing to upgrade the call.

In sum, Plaintiffs have failed to raise a question of fact regarding whether discrimination was a motivating factor in Hopkins's actions. Therefore,

Hopkins is entitled to summary judgment based on qualified immunity.

2. Wakefield

Plaintiffs argue that Hopkins's supervisor Wakefield acted improperly by (1) instructing Hopkins to hang up the 9-1-1 call, (2) providing less assistance to female victims in high crime and minority race neighborhoods, (3) giving lower priority to domestic violence calls, and (4) not instructing the officers to use lights and sirens or make an emergency entry to the residency. Doc. 148 at 48.

Plaintiffs' first argument fails because they have brought no evidence indicating that the decision to hang up the 9-1-1 call was unreasonable or discriminatory. Wakefield did not instruct Hopkins to hang up the call until after they had waited through nearly ten minutes of silence. Doc. 149-1 at 26-27. Moreover, the evidence indicates that Wakefield did not listen to Deanna's 9-1-1 call and was told only that the call was an open-line disturbance call. Wakefield was not aware that the assailant was reported to have broken the door to gain entry or that he threatened to kill Deanna. Plaintiffs' reliance on the letter disciplining Hopkins is also unavailing because it does not address the decision to hang up the phone. *See* Doc. 149-2 at 41. While Plaintiffs claim that "City of Dallas [has] records of other employees who were also ignoring domestic violence complaints and declining to arrest perpetrators," Plaintiffs fail to cite any evidence in the record to support this claim. Doc. 148 at 49-50. Plaintiffs point to no other evidence regarding the decision to hang up the phone after nearly ten minutes

of silence. Therefore, Plaintiffs have not raised a fact question regarding whether Wakefield's actions were unreasonable or discriminatory. Plaintiffs' second and third arguments fail because they are unsupported and conclusory. *See* Doc. 148 at 48. Finally, Plaintiff's fourth argument fails for the same reasons applied to Hopkins. Because the evidence does not indicate that the decision to not upgrade the call was unreasonable on the basis of the information known by Wakefield, Wakefield is entitled to summary judgment on qualified immunity. Additionally, Plaintiffs bring no evidence that any of Wakefield's actions or inactions were influenced by a discriminatory motive.

3. Mitchell

Plaintiffs assert that Mitchell discriminated against Deanna by failing to prioritize Deanna's call because of her race, gender, socioeconomic neighborhood, and status as a domestic violence victim. Doc. 148 at 46-47. Specifically, Plaintiffs argue that Mitchell had access to information about Deanna's status, and delayed dispatching police officers based on that information. *Id.*

At the time Mitchell received information about Deanna's call, Mitchell only knew the information that Hopkins had submitted in the Priority II report—that a female called 9-1-1 at 10:57 a.m. and the call taker heard scuffling and a disturbance in the background. Doc. 146-1 at 14. Because no police officers were available, Mitchell placed Deanna's call in queue with other calls. Doc. 146-1 at 43-45. The calls in the queue were to be assigned to officers as soon as they became available based on the priority level of the call and the

order in which the call was received. *Id.* Based on this procedure, Deanna's call was not assigned by Mitchell until the Officers noticed Deanna's call in the queue and volunteered to take it at 11:29. *Id.* at 66. Now, Plaintiffs complain that this delay occurred as a result of Mitchell's intent to discriminate against Deanna.

Plaintiffs' arguments fail because they have brought no evidence that discrimination was a motivating factor for Mitchell's actions. Mitchell offered uncontroverted sworn testimony that she was not familiar with Deanna's neighborhood, did not know Deanna's race, and did not know Deanna was a domestic violence victim on the night of the incident. Doc. 146-3 at 26-27, 69, 87. Without knowledge of Deanna's race, neighborhood, or status as a domestic violence victim, Mitchell could not have had a discriminatory motivation based on Deanna's status. Plaintiffs argue that a fact issue remains regarding Mitchell's credibility because she had access to Deanna's premise history and incident editor. Doc. 148 at 47. However, Plaintiffs point to no evidence suggesting that Mitchell looked at Deanna's premise history. *Cf.* Doc. 148 at 46-48. Mitchell testified that in carrying out her duties, there was no reason to look at the premise history and she did not do so. Plaintiffs rely entirely on the speculation that Mitchell could have looked at the premise history and could have been motivated by the information in it. This conjecture is insufficient to defeat summary judgment. Plaintiffs fail to cite any testimony from Mitchell or any other witness that indicates Mitchell knew Deanna's status, let alone that Mitchell had a discriminatory motive. *Cf.* Doc. 148 at

46-48. Therefore, Mitchell is entitled to summary judgment on qualified immunity.

4. The Officers

Plaintiffs argue that the Officers discriminated against Deanna by (1) not responding to the call with the appropriate urgency, (2) stopping at 7-11 for personal purchases on the way to the call, (3) refusing to investigate the rear of Deanna's residence, (4) refusing to forcibly enter the residence, (5) providing less protection to female victims, (6) giving lower priority to 9-1-1 domestic violence calls, and (7) not driving fast with lights and sirens on. Doc. 148 at 39.

However, the Plaintiff's own evidence shows that at the time the Officers volunteered to respond to Deanna's call, they were about fourteen minutes away from Deanna's residence. Doc. 149-2 at 68. The Officers arrived at the residence less than sixteen minutes after they received the assignment. *See* Doc. 146-1 at 14. Accordingly, the Officer stopped for only two minutes to purchase water on the way to the Priority II call. Because the call was denoted as a Priority II call, the Officers did not know there was an emergency and could not use lights and sirens.[1] Moreover, Plaintiffs offer no evidence that the Officers knew of Deanna's race, socioeconomic, or domestic violence victim status.

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[1] Because the information regarding the assailant forcibly entering Deanna's residence and threatening to kill her was not forwarded by the 9-1-1 call taker to dispatch, the Officers were not fully aware of the situation at Deanna's house.

Nothing indicates that the Officers accessed that information or need it.

Even assuming that the Officers acted unreasonably and knew about Deanna's race, gender, socioeconomic neighborhood, and status as a domestic violence victim, Plaintiffs offer no evidence linking that knowledge to the Officers' actions. Instead, Plaintiffs argue that the proximity in time between the Officers learning the information and their actions "suffices to produce a genuine issue of material fact." Doc. 148 at 41. Plaintiffs also rely on the Officers' statements that they do not remember ever taking fifteen minutes to reach a Caucasian residence or ever stopping to buy water while traveling to a call in the past. Doc. 148 at 41-42. However, the Officers' statements only indicate that they do not remember "what [they] have or have not stopped for or where or when" or whether they ever took more than fifteen minutes to respond to a call by a Caucasian. Doc. 149-1 at 66; Doc. 146-6 at 77. Neither statement suggests that the Officers would have taken less time to respond or would have investigated the residence more thoroughly if the call had come from a similarly situated person of a different race, gender, or socioeconomic group. Likewise, the proximity in time does not, on its own, create a triable question regarding whether the Officers had the intention to discriminate.

The sum of Plaintiffs' complaints merely allege that the Officers failed to treat Deanna as well as they should have. Plaintiffs offer no direct or circumstantial evidence that the Officers treated Deanna differently than they would have treated anyone of a different

race, gender, or socioeconomic group. The central issue of an equal protection claim is whether a person has been intentionally treated differently from others similarly situated. *See Gibson v. Tex. Dep't of Ins.—Div. of Workers' Comp.,* 700 F. 3d 227, 238 (5th Cir. 2012) (citations omitted). Ultimately, Plaintiffs offer no evidence that the Officers acted with discriminatory intent. Therefore, the Officers are entitled to summary judgment on qualified immunity.

b. Plaintiffs' Alternative Class of One Claim

Finally, Plaintiffs argue that in the alternative, the Court should reconsider its order dismissing Plaintiffs' class of one claim. Doc. 148 at 54. After reviewing the Court's prior order, the Court maintains its decision. Complaint clearly alleges that Deanna was treated differently precisely because she was a member of one or more of the classes addressed above—not because she represented a "class of one." *See* Doc. 81 at 27-31; Doc. 92 at 21-22. In addition to failing to reference the "class of one" theory in the pleadings, the facts and causes alleged do not present "a plain statement of the claim," much less one that is "simple, concise, and direct." Doc. 62; *see also* Fed. R. Civ. P. 8(a), (d). Thus, the Court is not persuaded that Plaintiffs have given the Officers "fair notice of what the ... claim is and the grounds upon which it rests." *Twombly,* 550 U.S. at 555 (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957) (omission in original)). The allegations are not sufficient to show that the Individual Defendants sought to deprive Deanna equal protection of the laws "for reasons of a personal nature unrelated to the [Officers'] duties." *Kelley v. City of Wake Village,* 246 F.

App'x 437, 444 (5th Cir. 2008). Altogether, the discrimination at issue appears to be based on one or more discrete classes—not some particularized animus against Deanna herself.

III. Conclusion

For the foregoing reasons, the Court GRANTS the Individual Defendants' Motions for Summary Judgment based on qualified immunity.

IT IS SO ORDERED.

Signed this 27th day of August, 2015.

/s/Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

3:12-cv-03788-P

[Filed October 28, 2013]

VICKIE COOK, Individually and As Natural Mother to DEANNA COOK, N.W., a Minor, By and Through Her Grandparent and Guardian VICKIE COOK and Karletha Vickie-Gundy, Individually and As Representative of The Estate of DEANNA COOK, DECEASED,	)
Plaintiffs,	)
vs.	)
THE CITY OF DALLAS, TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, YAMINAH SHANI MITCHELL, JULIA MENCHACA, AMY WILBURN, and ANGELIA HEROD-GRAHAM,	)
Defendants.	)

ORDER

Now before the Court is Defendants Julia Menchaca and Amy Wilburn's ("the Officers") Rule 12(b)(6) Motion to Dismiss Plaintiffs' Claims Alleged Against Them in Plaintiffs' Second Amended Original Complaint ("Motion to Dismiss"), filed on April 17, 2013. (Doc. 72) Plaintiff Vickie Cook ("Vickie"), individually and as natural mother of Deanna Cooke ("Deanna"), et al., filed a Response on May 6, 2013. (Doc. 81) The Officers filed a Reply on May 22, 2013. (Doc. 87) Vickie filed a Surreply on May 30, 2013. (Doc. 92)

After reviewing the parties' briefings, the evidence, and the applicable law, the Court GRANTS in part and DENIES in part the Officers' Motion to Dismiss.

I. Background

This lawsuit is about the City of Dallas' response to a 9-1-1 call. Deanna had a history of calling the police to report domestic abuse. (Doc. 62, p. 7) On August 17, 2012, a 9-1-1 call center operator answered a call from Deanna, in which the operator could hear Deanna screaming for assistance and pleading with her attacker to stop. (*Id.* at 4-5) After approximately ten minutes, a dispatch request was made, asking officers to go to Deanna's residence; however, the call was not prioritized and officers were asked to volunteer for the call. (*Id.* at 6)

The Officers, who were in the field, volunteered to check into Deanna's call. (*Id.* at 7) While en route to Deanna's residence, the Officers stopped to investigate a residential burglary alarm call, to make personal

purchases at a convenience store, and to complete disposition comments for a previously resolved call. (*Id.*) While at the convenience store, Officer Menchaca requested that the dispatcher take her and Officer Wilburn off the call. (*Id.*) However, the dispatcher misunderstood the request. (*Id.*) According to Plaintiffs, the Officers were aware that in her 9-1-1 call Deanna "was screaming for help and that a scuffle could be heard in the background." (*Id.*) Additionally, the Officers allegedly knew that Deanna was a minority calling from a socioeconomically deprived neighborhood about what appeared to be a domestic dispute and that she had previously reported claims of domestic violence and stalking. (*Id.* at 6-8, 23)

Although critical calls are purportedly responded to within six minutes, the Officers arrived at Deanna's residence approximately 40 minutes after they volunteered for the call. (*Id.* at 8, 12) The Officers knocked on the door, and, when there was no answer, had someone call Deanna's cell phone. (*Id.*) The call went to voicemail. (*Id.*) The Officers did not go to the rear of Deanna's residence or attempt to peer through Deanna's windows. (*Id.*) Shortly after they arrived, the Officers left Deanna's residence without further investigation. (*Id.*)

Two days later, Deanna's two daughters, her mother, and her sister (the "family") called 9-1-1 after Deanna did not show up for church and did not respond to knocks on her door or calls to her cell phone. (*Id.* at 8-9) Angelia Herod-Graham ("Herod-Graham") answered their call but allegedly withheld dispatching any police until the family first checked local hospitals

and prisons. (*Id.* at 9) Failing to generate a police response to their call, the family decided to force their way into the residence and ultimately discovered Deanna's lifeless body in her bathtub, the victim of an apparent homicide. (*Id.* at 9-10)

On March 22, 2013, Vickie filed her Second Amended Complaint against the Officers, among others, in federal court. (Doc. 62) As amended, Vickie sues for: (1) federal due process violations; (2) federal equal protection violations; (3) negligence and gross negligence; (4) bystander recovery; (5) wrongful death; and (6) survival. (*Id.* at 19-36) The Officers now challenge these claims.

II. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss complaint when a plaintiff has failed to state a claim for which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). "To survive a 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.'" *Iqbal v. Ashcroft,* 556 U.S. 662, 677 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). The factual matter contained in the complaint must allege actual facts, not mere legal conclusions portrayed as facts. *Id.* at 667 ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a factual allegation.'") (quoting *Twombly,* 550 U.S. at 555). Additionally, the factual allegations of a complaint must state a plausible claim for relief. *Id* A complaint states a "plausible claim for relief" when the

factual allegations contained therein, taken as true, necessarily demonstrate actual misconduct on the part of the defendant, not a "mere possibility of misconduct." *Id.*; *see also Jacquez v. Procunier,* 801 F.2d 789, 791-92 (5th Cir. 1986).

III. The Officers' Motion to Dismiss

The Officers move to dismiss Vickie's claims for (1) federal due process violations; (2) federal equal protection violations; (3) negligence and gross negligence; (4) bystander recovery; (5) wrongful death; and (6) survival. (Doc. 72) As to the federal due process and equal protection claims, the Officers argue that all of Vickie's allegations are conclusory assertions of misconduct and thus insufficient to permit a reasonable inference that the Officers' conduct deprived Deanna of a federally protected right. (*Id.*) In support of dismissing the remaining claims, the Officers re-urge the City of Dallas's motion requesting dismissal of the Texas tort claims against the Officers. (*Id.*)

a. Federal Claims

Vickie brings her federal due process and equal protection claims against the Officers in their personal capacities pursuant to 42 U.S.C. § 1983.[1] (Doc. 62, pp.

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[1] It is unclear from the Complaint whether Vickie's claim is brought against the Officers in their personal capacities, their official capacities, or both. (*See* Doc. 62, pp. 25-26). Vickie alleges that the Officers "acted independently during some of the conduct or omissions [described in the Second Amended Complaint (the "Complaint")] and within the general scope of [their] employment during other conduct or inaction." (*Id.*) However, Vickie's Response emphasizes personal liability. (Doc. 81, pp. 9-10) Because an

2, 25-26; Doc. 83, p. 9-10) To prevail under a § 1983 claim against the Officers in their personal capacity, Vickie must show that the Officers, acting under color of state law, deprived Deanna of a federal right.[2] *See Kentucky v. Graham,* 473 U.S. 159, 166 (1985); *Brown v. Miller,* 519 F.3d 231, 236 (5th Cir. 2008).

Vickie alleges that the Officers' liability stems from their failure to prioritize and to promptly and adequately respond to Deanna's call, thereby violating Deanna's constitutional rights to due process and equal

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official-capacity suit against the Officers is no different than a suit against the City itself and the Complaint names the City directly, the Court proceeds as if the suit was brought against the Officers solely in their personal capacities. *See Will v. Mich. Dep't of State Police,* 491 U.S. 58 (1989) ("Although 'state officials literally are persons,' an official-capacity suit against a state officer 'is not a suit against the official but rather is a suit against the official's office. As such it is no different from a suit against the State itself.'" (citation omitted); *Monell v. Dep't of Soc. Serv. Of City of N. Y.*, 436 U.S. 658, 690, n. 55 (1978) ("[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.").

[2] The Officers argue in their Motion to Dismiss that Vickie cannot successfully plead a § 1983 violation based on the Officers' failure to follow Article 5.04(a) of the Texas Code of Criminal Procedure because § 1983 only applies to federal rights. (Doc. 72, pp. 20-21) This might be true if Vickie were merely alleging a state law violation. Instead, Vickie is arguing that § 1983 liability attaches because the state law was violated "due to [Deanna's] minority status." (Doc. 62, p. 22) The state law violation is merely incidental to the underlying allegation of racial discrimination. Thus, rightly understood, Vickie's claim that the Officers violated Deanna's due process and equal protection rights by failing to follow Article 5.04(a) does not fail as a matter of law and is included in the ensuing discussion.

protection. (Doc. 62, p. 25) It is clear that the Complaint alleges sufficient factual matter to establish the "under color of law" prong required to succeed in a § 1983 claim.[3] (Doc. 62, pp. 4, 6-8) Thus, the Court will not discuss this element. In their briefings, the Officers and Vickie address the sufficiency of the factual matter to establish a constitutional violation. The Court individually addresses Vickie's claims for (1) due process violations and (2) equal protection violations.

i. **Due Process**

The Court first considers Vickie's due process claim. The Due Process Clause of 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. It only protects an individual's life, liberty, and property from government action. *DeShaney v. Winnebago Cnty. Dep't Soc. Servs.,* 489 U.S. 189, 195 (1989); *see also Kovacic v. Villarreal,* 628 F.3d 209, 213 (5th Cir. 2010). The "failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *McClendon v. City of Columbia,* 305 F.3d 314, 324 (5th Cir. 2002) (quoting *DeShaney,* 489 U.S. at 197). Indeed, the Due Process Clause generally does not confer an "affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government

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[3] Acts performed by an officer in her capacity as a police officer, even if illegal or not authorized by state law, are considered to have been taken under color of law. *Monroe v. Pape,* 365 U.S. 167, 180 (1961) (overruled on other grounds by *Monell,* 436 U.S. 658).

itself may not deprive the individual." *DeShaney,* 489 U.S. at 195; *see also Kovacic,* 628 F.3d at 213.

Only in "certain limited circumstances" when a "special relationship" is formed between the individual and the government does the Due Process Clause impose on the government a duty to protect an individual from private violence. *McClendon v. City of Columbia,* 305 F.3d 314, 324 (5th Cir. 2002) (quoting *DeShaney,* 489 U.S. at 198,200). Such a relationship is formed "[w]hen the state, through the affirmative exercise of its powers, acts to restrain an individual's freedom to act on his own behalf 'through incarceration, institutionalization, or other similar restraint of personal liberty.'" *Kovacic,* 628 F.3d at 213 (citing *McClendon,* 305 F.3d at 324 (quoting *DeShaney,* 489 U.S. at 200)). When considering "other similar restraints on personal liberty" it is important to note that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *DeShaney,* 489 U.S. at 200.

As an additional basis for liability, some jurisdictions have endorsed the "state-created danger theory." (*See* Doc. 81, pp. 20-21) This doctrine makes the state liable under § 1983 "if it created or exacerbated the danger" of private violence. *Bustos v. Martini Club Inc.,* 599 F.3d 458, 466 (5th Cir. 2010). However, the Fifth Circuit "has consistently refused to recognize a 'state-created danger' theory of § 1983 liability even where the question of the theory's

viability has been squarely presented."[4] *Beltran v. City of El Paso,* 367 F.3d 299, 307 (5th Cir. 2004); *see also Bustos,* 599 F.3d at 466 n.4; *Estate of Carmichael ex rel. Carmichael v. Galbraith,* No. 3:11-CV-0622-D, 2012 WL 13568, at *3 (N.D. Tex. Jan. 4, 2012) ("[B]ecause the state-created danger exception to *DeShaney* is not recognized in this circuit, the court dismisses [the plaintiffs] § 1983 claim to the extent it is based on an alleged violation of the Due Process Clause of the Fourteenth Amendment."). Therefore, since the Fifth Circuit does not recognize the state-created danger theory, this Court will not consider it for claims alleging Due Process Clause violations.

Taken as true, the facts in Vickie's Second Amended Complaint (the "Complaint") demonstrate that the Officers failed to prioritize Deanna's call, instead stopping to make personal purchases at a convenience store, to investigate a residential burglary alarm, and to complete disposition comments from a previously resolved call before arriving at Deanna's house approximately 50 minutes after Deanna placed her 9-1-1 call. *(See* Doc. 62, pp. 7-8, 25-26) The Complaint

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[4] "A panel of this Court adopted the state-created danger theory. *McClendon v. City of Columbia,* 258 F.3d 432, 436 (5th Cir. 2001). However, after *en banc* review, the panel's ruling was vacated and with it our recognition of the theory. *See McClendon v. City of Columbia,* 305 F.3d 314, 333 (5th Cir. 2002); Fifth Circuit Rule 41.3. In *Scanlan v. Tex. A&M Univ.,* 343 F.3d 533 (5th Cir. 2003), we found that 'this Court has never explicitly adopted the state-created danger theory.' *Id.* at 537. Despite remanding that case to the district court for further proceedings, we did not recognize the state created danger theory." *Rivera v. Haus. Indep. Sch. Dist.,* 349 F.3d 244, 249 n.5 (5th Cir. 2003).

further alleges that once at Deanna's residence, though aware that Deanna had previously reported claims of domestic violence and stalking, the Officers inadequately investigated the scene when they were unable to make contact with Deanna. (*See id.* at 8, 21-22, 25-26) Most importantly, for Due Process Clause purposes, the Complaint alleges Deanna's death resulted from domestic violence. *(See id.* at 4-11, 19-27) Thus, the only reasonable inference is that Deanna's attacker was a private actor and not a government actor.

Considering the pleadings, Vickie fails to allege sufficient facts to state a plausible claim that the Officers violated Deanna's due process rights. Even drawing all inferences in Vickie's favor, the facts simply do not show that a government actor deprived Deanna of her life, liberty, or property. Furthermore, there is no evidence to suggest that the government ever restrained Deanna's personal liberty to act on her own behalf, thereby creating a "special relationship."[5] At best, the facts demonstrate knowledge of Deanna's predicament and a failure to provide government aid necessary to protect her life, liberty, or property. (*See* Doc. 62, pp. 4-11, 19-26) Indeed, the Complaint's

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[5] In her Response, Vickie conflates the "special relationship" exception with the "state-created danger theory." The two cases she discusses to support a "special relationship" between Deanna and the state address the "state-created danger theory." (*See* Doc. 81, pp. 21-23); *Okin v. Vill. of Cornwall-On-Hudson Police Dep't,* 577 F.3d 415 (2d Cir. 2009); *Freeman v. Ferguson,* 911 F.2d 52 (8th Cir. 1990). Thus, the cases are inapposite because the Fifth Circuit does not recognize the "state-created danger" theory and the cases do not provide support for a "special relationship."

underlying argument is that the Officers, and the other Defendants, violated Deanna's rights "by failing to provide proper emergency assistance." (*See id.* at 19) But this does not state a claim for a Due Process Clause violation. *See DeShaney,* 489 U.S. at 200.

Therefore, the Court GRANTS the Officers' Motion to Dismiss the § 1983 claim to the extent that it alleges a violation of the Due Process Clause of the Fourteenth Amendment because Vickie failed to plead sufficient facts showing that a government actor caused Deanna's bodily harm or created a special relationship between her and the state.

ii. **Equal Protection**

The Court next considers whether Vickie pled sufficient facts to state a § 1983 claim that the Officers violated the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "The Equal Protection Clause directs that persons similarly situated should be treated alike." *Williams v. Bramer,* 180 F.3d 699, 705 (5th Cir. Tex. 1999) (citing *Plyler v. Doe,* 457 U.S. 202, 216 (1982)). "To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege either that (a) 'a state actor intentionally discriminated against [him] because of membership in a protected class[,]' or (b) he has been 'intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Gibson v. Tex. Dep't of Ins.–Div. of Workers' Comp.,* 700 F. 3d 227, 238 (5th Cir.

2012) (citations omitted). "Purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences'; it involves a decisionmaker's undertaking a course of action "'because of," not merely "in spite of," [the action's] adverse effects upon an identifiable group.'" *Iqbal,* 556 U.S. at 663.

Vickie maintains that the pleadings establish that the Officers discriminated against Deanna (1) on the basis of race, gender, socioeconomic background, and status as a victim of domestic violence and (2) as a "class of one." (Doc. 81, pp. 14, 27-28) The Court will address each in turn.

1. Race, Gender, Socioeconomic, and Domestic Violence Victim Discrimination

The Complaint states that the Officers both responded to Deanna's call and conducted their investigation at Deanna's residence in a discriminatory fashion because of Deanna's race, gender, socioeconomic background, and status as a victim of domestic violence.[6] (*See* Doc. 62, pp. 20-23, 25)

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[6] In adopting the *Watson* test in *Shipp,* the Fifth Circuit recognized that the allegation that domestic violence victims were treated differently than other crime victims was a route to proving gender-based discrimination, as a disproportionate amount of domestic violence victims are women. *See Shipp v. McMahon,* 234 F.3d 907 (5th Cir. 2000), *overruled on other grounds, McClendon v. City of Columbia,* 305 F.3d 314 (5th Cir. 2002). There, the argument was that domestic violence victims were treated differently *because* they are women. In addition to the argument that the Officers participated in gender-based discrimination as evidenced by the

Specifically, the Complaint alleges that the Officers responded to Deanna's call and arrived at her residence at a "time considerably in excess of the time in which Defendants would have responded to a similarly situated person in a more affluent section of the [City of Dallas] that did not have a predominately minority population" or "to a similarly situated non-minority." (*Id.* at 22; *see also id.* at 21) The Officers' responded deficiently "because [they] continually believed this domestic situation in a less affluent neighborhood was less deserving of their attention," which is "not at all related to any governmental purpose." (*Id.* at 21) The Officers then failed to conduct the type of investigation that "would have been conducted had [Deanna] not been a victim of domestic abuse, a minority or a resident in a high crime area." (*Id.* at 22) Additionally, once at Deanna's residence, the Officers failed "to follow the requirements listed in Art. 5.04(a) of the Code of Criminal Procedure due to [Deanna's] minority status." (*Id.* at 22)

Accepting the allegations as true and taking the facts in the most favorable light to Vickie, the Complaint alleges sufficient factual matter to demonstrate that the Officers intentionally discriminated against Deanna on the basis of race, gender, socioeconomic background, or status as a victim of domestic violence. Though the Officers

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treatment of Deanna as a domestic violence victim, the Complaint alleges discrimination against domestic violence victims generally, regardless of gender. As such a group is not a protected class under the Equal Protection Clause, the Complaint must show that such discrimination is not rationally related to a government interest.

volunteered for the call, they were made aware that, in her 9-1-1 call, Deanna was screaming for help and that a "scuffle" could be heard in the background. (*Id.* at 7) Additionally, while at Deanna's residence, the Officers knew that Deanna had "previously reported claims of domestic violence and stalking." (*Id.* at 8)

Armed with such knowledge and viewing the claims in a light most favorable to Vickie, it is not an unreasonable inference that the lengthy response time and the deficient investigation were due to discriminatory intent. Here, despite awareness that Deanna had been screaming for help and that there was audible evidence of an altercation, the Officers took over 40 minutes to respond to Deanna's call. During those 40 minutes, the Complaint alleges that the Officers stopped to make personal purchases, to respond to a residential burglary alarm, and to take disposition comments from a previous call. (*Id.* at 7) This is juxtaposed with Police Chiefs Brown statement that "critical calls" are responded to within six minutes.[7] (*Id.* at 12) Additionally, though the Officers were aware of the nature of Deanna's call and her previous reported claims of domestic violence, they did nothing more than knock on the front door of Deanna's residence and attempt to call her cell phone. (*Id.* at 8) While it is true, as the Officers assert, that there are alternative explanations for the Officers' behavior, they are not "obvious," unlike the alternative explanations in both *Twombly* and *Iqbal.* (Doc. 87, pp.7-9); *Twombly,* 550 U.S. at 567; *Iqbal,* 556 U.S. at 681. While the

[7] This admission provides evidence of disparate treatment between domestic violence and other types of service requests.

Complaint may not establish that the Officers' discriminatory intent is probable, it is not "beyond a doubt that [Vickie] cannot prove a plausible set of facts that support the claim and would justify relief." *Lane v. Halliburton,* 529 F.3d 548, 557 (5th Cir. 2008) (citing *Twombly,* 550 U.S. 544).

However, merely showing that discrimination against women was a motivating factor in the Officers' response and investigation is not sufficient to sustain a gender-based Equal Protection claim based on law enforcement policies, practices, and customs toward domestic assault and abuse cases in the Fifth Circuit. *See Shipp v. McMahon,* 234 F.3d 907, 914 (5th Cir. 2000), *overruled on other grounds, McClendon v. City of Columbia,* 305 F.3d 314 (5th Cir. 2002). In addition, a successful plaintiff must also show (1) "the existence of a policy, practice, or custom of law enforcement to provide less protection to victims of domestic assault than to victims of other assaults" and that "(2) the plaintiff was injured by the policy, custom, or practice." *Id.* Viewing the facts in a light most favorable to Vickie, the Court finds sufficient factual matter to infer a policy, practice, or custom of providing less protection to female victims of domestic violence. Specifically, the Court notes that Chief Brown stated that "critical calls" are responded to within six minutes. (Doc. 62, p. 12) Additionally, the Complaint sufficiently establishes that Deanna suffered injury as a result of the policy, custom, or practice. (*Id.* at 10-11, 20)

Thus, in alleging that the Officers responded to Deanna's call and conducted their investigation in a discriminatory manner because of Deanna's race,

gender, socioeconomic background, and status as a victim of domestic violence, Vickie pleads sufficient factual matter to nudge her equal protection claim across the line from conceivable to plausible. In sum, all four bases for equal protection violations survive dismissal.

2. "Class of One" Claim

Unlike Vickie's other equal protection claims, Vickie and the Officers dispute whether or not Vickie has actually pled a "class of one" claim. Vickie maintains that the Complaint states a a claim that Deanna was denied equal protection as a "class of one." (Doc. 81, pp. 27-31) The Officers argue that Vickie fails to proffer such a claim in the Complaint. (Doc. 87, p. 10)

The Supreme Court has recognized equal protection claims for "class of one" victims of discrimination. *See Stotter v. Univ. of Tex. at San Antonio,* 508 F.3d 812, 823-24 (5th Cir. 2007); *see also Vill. of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000). To establish an equal protection claim under the "class of one" theory, a plaintiff must show: (1) disparate treatment of otherwise like individuals, and (2) an absence of a rational basis for the treatment. *See Stotter,* 508 F.3d at 824.

Having reviewed the Complaint in the light most favorable to Vickie, the Court finds that Vickie has failed to properly state a claim that Deanna was denied equal protection as a "class of one." While Vickie correctly identifies that the Federal Rules of Civil Procedure permit a plaintiff to plead inconsistent claims in the alternative, the Complaint fails to lay out

any such alternative. (Doc. 92, p. 21); *see also* Fed. R. Civ. P. 8(d). The first mention of Deanna perhaps representing a "class of one" arises in Vickie's Response. (Doc. 81, pp. 27-31) Although the Response and Surreply both point the Court to specific paragraphs wherein Vickie has alleged facts tending to show that Deanna was treated differently and that it was wholly irrational to do so, the Complaint clearly alleges that Deanna was treated differently precisely because she was a member of one or more of the classes addressed above—*not* because she represented a "class of one." (*See* Doc. 81, pp. 27-31; Doc. 92, pp. 21-22) Although the allegations postulate that the Officers eventually became aware of Deanna's identity, the facts are insufficient to demonstrate discriminatory treatment against her absent association with a recognized class. In addition to failing to reference the "class of one" theory in the pleadings, the facts and causes alleged do not present "a plain statement of the claim," much less one that is "simple, concise, and direct." (Doc. 62); *see also* Fed. R. Civ. P. 8(a), (d). Thus, the Court is not persuaded that Vickie has given the Officers "fair notice of what the ... claim is and the grounds upon which it rests." *Twombly,* 550 U.S. at 555 (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957) (omission in original)).

In short, the Court dismisses Vickie's "class of one" claim.[8]

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[8] While leave to amend is generally favored, Vickie does not demonstrate how a *fourth* round of pleadings will correct the aforementioned deficiencies because the facts do not show that the Officers acted in derogation of Deanna's rights as an entity unto

b. State Law Claims

Finally, the Officers request that the Court dismiss the state law claims because the City of Dallas has filed a motion to dismiss these claims under section 101.106(e) of the Texas Civil Practice and Remedies Code. Vickie rightly points out in her Response that government employees cannot request the dismissal of a claim filed under this statute. (Doc. 81, p. 29) Texas Civil Practice and Remedies Code § 101.106(e) specifies that it is the "motion by the governmental unit" that dismisses a tort claim against a government employee brought under the statute; it does not provide the same opportunity to a governmental employee. *See Hernandez v. City of Lubbock,* 253 S.W.3d 750, 753-56 (Tex. App.–Amarillo 2007, no pet.); *see also City of Houston v. Esparza,* 369 S.W.3d 238, 247 n.10 (Tex. App.–Houston [1st Dist.] 2011, pet. filed); *Tristan v. Socorro Indep. Sch. Dist.,* 902 F. Supp. 2d 870, 875 (W.D. Tex. 2012). The City of Dallas's Motion to Dismiss has been granted in a separate order. Therefore, the Court DENIES as moot the Motion to Dismiss Vickie's state tort claims.

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herself. (*See* Doc. 81, pp. 27-28) Indeed, the Complaint alleges nothing more than that, while at Deanna's residence, the Officers knew that she had made previous calls reporting domestic violence. (Doc. 62, p. 7) The allegations are not sufficient to show that the Officers sought to deprive Deanna equal protection of the laws "for reasons of a personal nature unrelated to the [Officers'] duties." *Kelley v. City of Wake Village,* 246 F.App'x 437, 444 (5th Cir. 2008). Altogether, the discrimination at issue appears to be based on one or more discrete classes—not some particularized animus against Deanna herself.

IV. Conclusion

For the foregoing reasons, the Court GRANTS the Officers' Motion to Dismiss to the extent that it relates to the Due Process Clause of the Fourteenth Amendment and to the extent that it relates to a "class of one" claim under the Equal Protection Clause of the Fourteenth Amendment, but it DENIES the Officers' Motion to Dismiss to the extent that it relates to state tort claims and to the extent that it relates to claims premised on the basis of race, gender, socioeconomic background, and status as a victim of domestic violence under the Equal Protection Clause of the Fourteenth Amendment.

IT IS SO ORDERED.

Signed this 28th day of October, 2013.

/s/Jorge A. Solis
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

APPENDIX G

U.S. Const. amend. XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief

was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fed. R. Civ. P. 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment 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. The court should state on the record the reasons for granting or denying the motion.

(b) TIME TO FILE A MOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) PROCEDURES.

> (1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> > (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence*. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited*. The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations*. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact

or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration

under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.