APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-5102

NANETTE BLANCHARD-DAIGLE,
Representative of the estate of Lyle Blanchard,
Appellant,
v.
SHANE GEERS; JIM HATFIELD; BELL COUNTY, TEXAS,
Appellees

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:18-CV-208

Before: BARKSDALE, STEWART, and COSTA, Circuit Judges

OPINION

PER CURIAM: *

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Nanette Blanchard-Daigle asserted claims under 42 U.S.C. § 1983 against Bell County, Texas, Bell County Sheriff's Deputy Shane Geers, and Texas Ranger Jim Hatfield for violations of Lyle Blanchard's rights under the Fourth Amendment, as incorporated in the Fourteenth Amendment, when he was killed during a traffic stop. The district court dismissed all claims against all defendants and awarded attorney's fees to Bell County and Deputy Geers. For the reasons set forth herein, we AFFIRM

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Facts

We draw the following facts from the appellant's complaint and the attachment thereto. Nanette Blanchard-Daigle ("Ms. Blanchard-Daigle") is the sister and representative of the estate of the deceased, Mr. Lyle Blanchard ("Mr. Blanchard"), who was a 59-year-old Navy veteran and resident of Harker Heights, Bell County, Texas. Deputy Geers is a Sheriff's Deputy with 17 years of experience in the Bell County Sheriff's Department. Ranger Hatfield is a Texas Ranger in the Texas Department of Public Safety.

On the afternoon of August 30, 2016, Deputy Geers observed Mr. Blanchard driving on East Knights Way in Bell County. Per his observation, Deputy Geers suspected Mr. Blanchard of driving while intoxicated and began following him, turning on his patrol siren and emergency lights. Then, Mr. Blanchard signaled and

made a right turn onto Rummel Road, a private gravel road toward his home. Mr. Blanchard travelled about 1,000 feet down the road before pulling over.

Upon stopping, Deputy Geers did not turn off his siren nor did he approach Mr. Blanchard's vehicle. Mr. Blanchard did not hear Deputy Geers give him any instructions or commands. Mr. Blanchard then opened his car door and exited the vehicle facing Deputy Geers, who was standing approximately 50 feet away, behind his patrol car door. When Mr. Blanchard reached for something, Deputy Geers shot Mr. Blanchard eight times, four of those bullets being fatal.

After the shooting, Deputy Geers spoke with Ranger Hatfield. Hatfield secured a warrant to search Mr. Blanchard's home to investigate an aggravated assault. Mr. Blanchard had been dead for eight hours by the time the warrant was signed.

B. Procedural History

Ms. Blanchard-Daigle initially filed suit in the Western District of Texas, Waco Division, on March 23, 2017. The matter was assigned to District Judge Robert Pitman and then referred to Magistrate Judge Jeffrey C. Manske. Appellees Bell County and Deputy Geers filed a joint motion to dismiss for failure to state a claim. In response, Ms. Blanchard-Daigle filed two amended complaints within eight days of each other. Appellee Ranger Hatfield then separately moved to dismiss Ms. Blanchard-Daigle's second amended complaint. Magistrate Judge

Manske issued a report and recommendation recommending the court grant both pending motions to dismiss. About a week later, in August 2017, Ms. Blanchard-Daigle voluntarily dismissed her suit.

Ms. Blanchard-Daigle then re-filed her complaint in the same district court on July 26, 2018, this time with a 23-page attachment—the expert report of Roger Clark. The matter was assigned to Judge Pitman and then referred to Magistrate Judge Manske, as in the first suit. Bell County and Deputy Geers filed their motion to dismiss on August 16, 2018 and Ranger Hatfield filed his own motion to dismiss on August 21, 2018. The matter was re-assigned to Judge Alan D. Albright on September 20, 2018, who then granted Appellees' motions to dismiss for failure to state a claim, with prejudice, on October 29, 2018. Ms. Blanchard-Daigle timely appealed.

II. STANDARD OF REVIEW

This Court reviews Rule 12(b)(6) motions to dismiss for failure to state a claim de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff[]." *Littell v. Hous. Indep. Sch. Dist.*, 894 F.3d 616, 622 (5th Cir. 2018). "The test for deciding these motions is what is written in the [complaint]." *Gause v. U.S. Dep't of Def.*, 676 F. App'x 316, 318 (5th Cir. 2017). To survive a motion to dismiss, a complaint need not contain "detailed factual allegations;" rather, it need only allege facts sufficient 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 is facially plausible when the plaintiff pleads facts allowing the court to draw reasonable inferences that point to the defendant's liability for the alleged misconduct. *Culbertson v. Lykos*, 790 F.3d 608, 616 (5th Cir. 2015). Appellees in this case argue that plain error applies but, to be sure, "no party has the power to control our standard of review." *United States v. Vonsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992) (en banc); *see also United States v. Davis*, 380 F.3d 821, 827 (5th Cir. 2004) ("[W]e, not the parties, determine our standard of review."). We proceed *de novo.*

III. DISCUSSION

Before discussing the merits of the case, we must clarify the scope of our review, especially in light of the restrictive 12(b)(6) standard.[1] Pursuant to Federal Rule of Civil Procedure 10(c), we are considering the expert report of Roger Clark as being part of the complaint. FED. R. CIV. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."). In their briefings and at oral argument, all parties urged this court that the appended attachment falls within the scope of Rule 10(c). We agree. In doing so, we are restricted to considering the "nonconclusory, factual portions" of the

[1] Like the district court, we decline to judicially notice the publicly available video footage in reaching our conclusion.

report. *See Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 285–86 (5th Cir. 2006) ("Even if *non-opinion* portions of an expert's affidavit constitute an instrument pursuant to Rule 10, opinions cannot substitute for facts . . . .") (emphasis in original).

A. Municipal Liability

Ms. Blanchard-Daigle argues that her complaint established Bell County's liability under 42 U.S.C. § 1983. We disagree.

To find a municipality liable under § 1983, a plaintiff must establish that (1) a policymaker (2) promulgates a policy or custom (3) that is the "moving force" of a violation of constitutional rights. *Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658, 694 (1978). An official policy "usually exists in the form of written policy statements, ordinances, or regulations, but may also arise in the form of a widespread practice that is 'so common and well-settled as to constitute a custom that fairly represents municipal policy.'" *James v. Harris Cty.*, 577 F.3d 612, 617 (5th Cir. 2009) (quoting *Piotrowski v. City of Hous.*, 237 F.3d 567, 579 (5th Cir. 2001)). The policy must be either unconstitutional or "adopted with deliberate indifference to the known or obvious fact that such constitutional violations would result." *Id.* (internal quotation marks omitted).

To base deliberate indifference from a single incident, "it should have been apparent to the policymaker that a constitutional violation was the highly

predictable consequence of a particular policy or failure to train." *Burge v. St. Tammany Par.*, 336 F.3d 363, 373 (5th Cir. 2003). To satisfy "moving force," Ms. Blanchard-Daigle "must show direct causation, i.e., that there was 'a direct causal link' between the policy and the violation." *See James*, 577 F.3d at 617 (quoting *Piotrowski*, 237 F.3d at 580). To be sure, "deliberate indifference" goes beyond mere or gross negligence, for a governmental entity cannot be held liable under § 1983 via *respondeat superior*. *Id.*; *see also Monell*, 436 U.S. at 691.

As a general matter, even when accepting the allegations against the County as true, the facts alleged in this complaint related to Bell County are so conclusory that it is difficult to assess the County's involvement, if any at all. Ms. Blanchard-Daigle's use of legal conclusions do not satisfy the *Twombly* and *Iqbal* pleading standard. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

Moreover, the face of the complaint does not satisfy the elements of *Monell* liability. In her appellate briefing, Ms. Blanchard-Daigle argues that her complaint satisfies the elements because (1) it names a policymaker—Bell County; (2) it asserts that the County's failure to train Deputy Geers on "how to respond to non-violent offenders" and "in the constitutional rules of the use of deadly force" amounts to an official policy or custom, as required by *Monell*; and (3) the failure to train policy was adopted with deliberate indifference such that it was the moving force behind Deputy Geers shooting and killing Mr. Blanchard. Though such

arguments strive to contextualize the complaint to fit these requirements, the face of the complaint falls short.

Ms. Blanchard-Daigle argues that, on the "policymaker" prong, the complaint goes beyond what this court required in *Groden v. City of Dallas*, 826 F.3d 280 (5th Cir. 2016). There, we stated that "the specific identity of the policymaker is a legal question that need not be pled; the complaint need only allege facts that show an official policy, promulgated or ratified by the policymaker, under which the municipality is said to be liable." *Groden*, 826 F.3d at 284. Indeed, we said that naming the entity that acted under the policy was fundamental. *Id.* at 284 n.4. Accordingly, Ms. Blanchard-Daigle has satisfied this prong since Bell County was named as a policymaker. However, Bell County argues that the complaint fails to establish the second and third prongs of the *Monell* test. We agree.

On the "official policy" prong, Ms. Blanchard-Daigle argues that the county's failure to train Deputy Geers and its subsequent failure to discipline him after the shooting amounted to a ratification and deliberate indifference to his need for more training. We disagree.

Failure to train may represent a policy for which the city may be held liable only if it directly causes injury. *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). The fact that an officer could be "unsatisfactorily trained" is not enough to

trigger the municipality's liability. *Id.* at 390–91. The plaintiff must show that (1) the training policy was deficient, (2) the County was deliberately indifferent to this deficiency in adopting the policy, and (3) the deficient training policy was the "moving force" of, i.e., directly caused, the constitutional violation. *Shumpert v. City of Tupelo*, 905 F.3d 310, 317 (5th Cir. 2018).

In this context, to sufficiently demonstrate that there was deliberate indifference, the plaintiff has to show that the municipality had actual or constructive notice of a pattern of similar constitutional violations caused by the policy. *See Connick v. Thompson*, 563 U.S. 51, 61–62 (2011). The complaint alleges that Deputy Geers was reprimanded in August 2014 for "poor participation and unbecoming behavior during a Firearms Electronic Simulator" and that "[t]his prior act shows Geers was unfamiliar with the gravity of using deadly force." Ms. Blanchard-Daigle argues that this one prior incident shows that Deputy Geers had such an unfamiliarity with the constitutional contours of excessive force that it amounts to the County's deliberate indifference to the fact that he needed different or additional training. This argument fails.

In *Rodriguez v. Avita*, we reiterated the Supreme Court's holding in *Oklahoma City v. Tuttle*, which is that "in general . . . a single shooting incident by a police officer [is] insufficient as a matter of law to establish the official policy requisite to municipal liability under § 1983." *Rodriguez v. Avita*, 871 F.2d 552,

554–55 (5th Cir. 1989) (paraphrasing *Okla. City v. Tuttle*, 471 U.S. 808, 821 (1985)). But, the "single-incident" exception to the *Monell* liability test can be sufficient to find a municipality liable when the plaintiff can show that "the 'highly predictable' consequence of a failure to train would result in the specific injury suffered, and that the failure to train represented the 'moving force' behind the constitutional violation." *Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005). This exception is applied only in extreme circumstances in order to not run afoul of the rule that municipalities cannot be held liable via *respondeat superior*. *Id.*; *see also Pineda v. City of Hous*., 291 F.3d 325, 334–35 (5th Cir. 2002) ("Charged to administer a regime without respondeat superior, we necessarily have been wary of finding municipal liability on the basis of [the single-incident] exception for a failure to train claim.").

Ms. Blanchard-Daigle implicitly argues that the single-incident exception should apply and relies on our decision in *Brown v. Bryan Cty*., 219 F.3d 450 (5th Cir. 2000), to support that argument. However, the single prior incident involving Deputy Geers during training that Ms. Blanchard-Daigle alludes to is not of the kind contemplated by the "single-incident" liability theory. *See Brown*, 219 F.3d at 460; *see also Roberts*, 397 F.3d at 296 (finding that the single-incident exception did not apply when the police chief "oversaw a significant training regimen" for

his subordinate officers and there was no evidence that the officer was "involved in any [prior] cases involving the improper use of deadly force").

In *Brown*, a Bryan County sheriff hired a reserve sheriff's deputy without vetting him through a pre-hiring screening process. *Brown*, 219 F.3d at 454. The reserve deputy was hired having no prior law enforcement experience and without any formal law enforcement training from the County. *Id.* There was also credible evidence showing that he did not participate in the state's law enforcement training program. *Id.* at 455. He had an extensive criminal record which included, inter alia, arrests for assault, battery and resisting arrest. *Id.* at 454. At the time of his hire, he was in violation of the terms of his probation and, as a result, there was an outstanding warrant for his arrest. *Id.* at 454–55. In the incident in that case, the reserve deputy used a violent "arm-bar" technique to take down the plaintiff during a traffic stop, which included grabbing her arm, pulling her from her vehicle, spinning her to the ground, and driving his knee into her back upon applying the arm-bar maneuver. *Id.* at 454. There was also credible evidence that he had an excessive number of "takedown arrests" similar in method to how the plaintiff was injured. *Id.* at 455.

When the Supreme Court heard the case, it stated that the single- incident exception was not applicable to the sheriff's hiring decision. *See Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 410–11 (1997). Specifically, the Court said that,

"predicting the consequence of a single hiring decision, even one based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties." *Id.* at 410. The Supreme Court vacated our judgment and remanded the case for findings consistent with their decision. *Id.* at 416.

On remand, we found that the single-incident exception was sufficient to find Bryan County liable under a failure-to-train theory because the reserve deputy received no law enforcement training once he was hired, had a violent past, and had a history of using excessive force during his time as a police officer. *Brown*, 219 F.3d at 462–65. We concluded that all of those facts taken together directly caused the incident and that the incident was highly predictable. *Id.*

The present case is not similar to what occurred in *Brown v. Bryan Cty*. The complaint stated that Deputy Geers received training from the state and county law enforcement training programs. It also failed to identify any prior excessive force incidents involving Deputy Geers in the field during the course of his 17 years in law enforcement. The complaint only pointed to Deputy Geers' one instance of poor performance during training. To that end, we have never said that an officer's singular poor performance in training provides sufficient constructive notice to a

municipality that it is highly predictable that a constitutional violation would result from it.

Moreover, we determine that Roger Clark's report attached to the complaint significantly undercuts Ms. Blanchard-Daigle's argument asserting Bell County's liability. The expert report attached to the complaint identifies two policies that form the basis of Deputy Geers' training: the Bell County Sheriff's Office Defensive Firearms Program ("BCSD Program") and the Texas Commission on Law Enforcement Education Basic Curriculum ("TCOLE Program"). The report provided specific examples of the deficiencies in the TCOLE program. Specifically, the report states that, "[t]hese deficiencies in training apparently include a lack of realistic scenario training at the TCOLE certified Academy given to Deputy Geers. Specific deficiencies include training designed to create 'muscle memory' responses to high risk incidents [and] meaningful continuing periodic training during their career as line Deputies." But, as to the BCSD program, the report merely states that Deputy Geers' actions were "indicative of the inadequate BCSD published policy and procedure." The report also noted that "no new BCSD policies have been implemented, and no existing BCSD policies have been corrected or clarified since this incident." Beyond these conclusory statements, he fails to identify the inadequacies in BCSD's policies.

Even when construing the complaint and the attachment in the light most favorable to Ms. Blanchard-Daigle, we do not identify any additional facts that marshal the allegations in the complaint into the realm of plausibility as established in *Twombly* and *Iqbal*. *See Twombly*, 550 U.S. at 555 ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (internal citations omitted); *see also Iqbal*, 556 U.S. at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."). Accordingly, because the complaint fails to satisfy the second prong of the *Monell* test, we need not analyze the third prong. In sum, the complaint fails to establish Bell County's liability under 42 U.S.C. § 1983. We affirm the district court's dismissal of the claims against Bell County.

B. Qualified Immunity

When properly applied, qualified immunity protects all officials "but the plainly incompetent or those who knowingly violate the law" and holds "public officials accountable when they exercise power irresponsibly." *Pearson v.*

Callahan, 555 U.S. 223, 231 (2009); *Malley v. Briggs*, 475 U.S. 335, 341 (1986). When invoked, the plaintiff must show that (1) a constitutional violation (2) was (a) objectively unreasonable (b) under clearly established law. *McClendon v. City of Columbia,* 305 F.3d 314, 322–23 (5th Cir. 2002) (en banc) ("Ultimately, a state actor is entitled to qualified immunity if his or her conduct was objectively reasonable in light of the legal rules that were clearly established at the time of his or her actions."). It is the plaintiff's responsibility to show that the defendant is not entitled to qualified immunity. *See Id.* at 323. At the 12(b)(6) stage, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.'" *Id.* (emphasis in original) (quoting *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996)).

To successfully plead an excessive force claim, the plaintiff must show (1) an injury, (2) that resulted directly from the use of excessive force, and (3) that the use of force was objectively unreasonable. *Freeman v. Gore*, 483 F.3d 404, 416 (5th Cir. 2007). When death results from the use of deadly force, the only issue to decide is if the use of deadly force was objectively unreasonable. *See Carnaby v. City of Hous.*, 636 F.3d 183, 187 (5th Cir. 2011). Objective unreasonableness is evaluated under three factors: (1) whether the suspect posed an immediate threat to the safety of the officers or others; (2) whether the suspect is actively resisting

arrest or attempting to flee; and (3) the severity of the crime at issue. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Ms. Blanchard-Daigle argues that the district court erred procedurally and substantively in finding that Deputy Geers was entitled to qualified immunity. As to procedural error, Ms. Blanchard-Daigle argues that the district court improperly viewed the facts most favorable to Deputy Geers and drew reasonable inferences in his favor rather than following the well-settled 12(b)(6) standard. As to substantive error, she argues that the complaint sufficiently alleges that the use of force was objectively unreasonable because it presented facts that showed that Mr. Blanchard was unarmed; that Deputy Geers knew that Mr. Blanchard was unarmed; that Mr. Blanchard was not fleeing nor attempting to flee; that he was not resisting arrest; and that Deputy Geers "escalated to the use of deadly force without using verbal de-escalation tactics," thus satisfying the factors of objective unreasonableness in *Graham v. Connor*. We disagree.

Deputy Geers is entitled to qualified immunity unless "every reasonable official would have understood that what he [was] doing violate[d]" a constitutional or statutory right. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)). The "dispositive question is 'whether the violative nature of [the officer's] *particular* conduct is

clearly established.'" *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)) (emphasis in original).

Deputy Geers' decision did not violate clearly established law. "Our circuit has repeatedly held that an officer's use of deadly force is reasonable when an officer reasonably believes that a suspect was attempting to use or reach for a weapon." *Valderas v. City of Lubbock*, 937 F.3d 384, 390 (5th Cir. 2019); se*e also Manis v. Lawson*, 585 F.3d 839, 844 (5th Cir. 2009) (collecting cases). We have found that officers reasonably used deadly force when a suspect reached for his waistband, *see Salazar-Limon v. City of Houston*, 826 F.3d 272, 279–80 (5th Cir. 2016), when a suspect reached under a seat while sitting in a parked car, *see Manis*, 585 F.3d at 844–45, and even when a suspect reached into a nearby boot, see *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 385 (5th Cir. 2009). In light of these precedents, we cannot say that every reasonable officer would have known that it was unconstitutional to use deadly force against a suspect who reached for something—particularly when Mr. Blanchard had driven 1,000 feet down a private road before pulling over and then exiting his vehicle unprompted. Qualified immunity thus defeats Ms. Blanchard-Daigle's claim against Deputy Geers.

C. Ranger Hatfield's Search Warrant

Ms. Blanchard-Daigle argues that Ranger Hatfield secured the warrant to search Mr. Blanchard's home for aggravated assault "as a pretext for investigation

into [Mr.] Blanchard's history" and to "besmirch [Mr. Blanchard] in the community and the media." We need not address this claim because our well-settled precedent holds that the deceased have no rights to be protected or invalidated under the Constitution. *Whitehurst v. Wright*, 592 F.2d 834, 840 (5th Cir. 1979) ("After death, one is no longer a person within our Constitutional and statutory framework, and has no rights of which he may be deprived."). Therefore, we affirm the district court's grant of dismissal as to the claims against Ranger Hatfield.

D. Attorney's Fees

Attorney's fees awards are reviewed for abuse of discretion on appeal. *Walker v. City of Bogalusa*, 168 F.3d 237, 239 (5th Cir. 1999). "A district court abuses its discretion if its award is 'based on an erroneous view of the law or a clearly erroneous assessment of the evidence.'" *DeLeon v. Abbott*, 687 F. App'x 340, 342 (5th Cir. 2017) (quoting *Walker*, 168 F.3d at 239).

42 U.S.C. § 1988(b) allows for the award of "reasonable attorney's fees" to "the prevailing party" in § 1983 cases. *Fox v. Vice*, 563 U.S. 826, 832–33 (2011). A prevailing defendant may be awarded attorney's fees only when a court finds that "the plaintiff's action was frivolous, unreasonable, or without foundation even though not brought in subjective bad faith." *Hughes v. Rowe*, 449 U.S. 5, 15 (1980) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)); *see*

also Walker, 168 F.3d at 240. "To determine if a claim is frivolous or groundless, courts may examine factors such as: (1) whether the plaintiff established a prima facie case; (2) whether the defendant offered to settle; and (3) whether the court dismissed the case or held a full trial." *Doe v. Silsbee Indep. Sch. Dist*., 440 F. App'x 421, 425 (5th Cir. 2011) (quoting *Myers v. City of W. Monroe*, 211 F.3d 289, 292 (5th Cir. 2000)). Frivolity determinations are done on a case-by-case basis. *Id.* Additionally, the fact that a claim may be "legally insufficient to require a trial [does] not, for that reason alone, [make the claim] 'groundless' or 'without foundation.'" *Id.* However, this court has generally affirmed attorney's fees awards when the plaintiff's claims lack "a basis in fact or rel[y] on an undisputably meritless legal theory." *Id.*

Ordinarily, to be awarded § 1988(b) attorney's fees, a party would have to prevail on the underlying merits of a claim, not simply on "procedural or evidentiary rulings" such as a motion to dismiss for failure to state a claim. *See Hanrahan v. Hampton*, 446 U.S. 754, 759 (1980) . In *Schwarz v. Folloder*, we said that "a dismissal with prejudice gives the defendant the full relief to which he is legally entitled and is tantamount to a judgment on the merits." *Schwarz v. Folloder*, 767 F.2d 125, 130 (5th Cir. 1985). We are satisfied that the appellees are prevailing parties because the appellant's claims were dismissed with prejudice.

Having established that the appellees here are prevailing parties, we must then determine if the attorney's fees award was an abuse of discretion. It is axiomatic that we may affirm the district court for any reason supported by the record, even those not relied on by the district court. *See LLEH, Inc. v. Wichita Cty.*, 289 F.3d 358, 364 (5th Cir. 2002). The district court reviewed the complaint and appended expert report, dismissed the pleadings with prejudice, and awarded attorney's fees to the appellees.

The district court found that this case was frivolous because Ms. Blanchard-Daigle had not established a prima facie case, the appellees had not offered to settle, and the case was dismissed with prejudice. However, we have stated before that "[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Silsbee Indep. Sch. Dist.*, 440 F. App'x at 425. Nonetheless, despite the grave circumstances giving rise to the case, Ms. Blanchard-Daigle had four total attempts at pleading this case. The magistrate judge's report and recommendation in the first suit was enough to put Ms. Blanchard-Daigle on notice of the complaint's factual deficiencies. The fourth and final attempt was the same factually deficient complaint except with an expert report affixed to it. That attempt still proved unsuccessful because of its lack of factual support in the complaint. Considering

the totality of these circumstances, we do not find an abuse of discretion and affirm the district court's award of attorney's fees to Bell County and Deputy Geers.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgement.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-5102

NANETTE BLANCHARD-DAIGLE,
Representative of the estate of Lyle Blanchard,
Appellant,
v.
SHANE GEERS; JIM HATFIELD; BELL COUNTY, TEXAS,
Appellees

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 2/12/20, 5 Cir., _____, _____ F. 3d _____)

Before: BARKSDALE, STEWART, and COSTA, Circuit Judges

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on

Rehearing En Banc (FED. R. APP. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

Date Entered: March 31, 2020.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

NANETTE BLANCHARD – DAIGLE
REPRESENTATIVE OF THE ESTATE OF
LYLE BLANCHARD;
Plaintiff

-vs-

SHANE GREERS, JIM HATFIELD, BELL
COUNTY, TEXAS,
Defendants

ORDER DISMISSING PLAINTIFF'S CLAIMS WITH PREJUDICE

Before the Court are Defendants Shane Geers and Bell County's Motion to Dismiss and Defendant Hatfield's Motion to Dismiss. ECF Nos. 9 & 11. Plaintiff Nanette Blanchard-Daigle brought this suit on behalf of the estate of Lyle Blanchard ("Blanchard") against Bell County Deputy Shane Geers ("Geers"), Bell County ("the County"), and Texas Ranger Jim Hatfield ("Hatfield") on July 26, 2018. ECF No. 1. The procedural history of the case is set forth in the Defendants' Motions to Dismiss, including the voluntary dismissal of the first case that the Plaintiff filed as the result of the Magistrate's recommendation that this Court dismiss the suit. ECF No. 9 at 1–3. Having reviewed the pleadings, the briefings of the Parties, the relevant law, and the case file as a whole, the Court now enters the following opinion and order.

Plaintiff seeks relief pursuant to 42 U.S.C. § 1983, which confers a private federal right of action against any person who, acting under color of state law, deprives an individual of any right, privilege or immunity secured by the Constitution or federal laws. *Burnett v. Grattan*, 468 U.S. 42, 45 n.2 (1984); *Stack v. Killian*, 96 F.3d 159, 161 (6th Cir. 1996). To state a § 1983 claim, a plaintiff must allege two elements: (1) a deprivation of rights secured by the Constitution and laws of the United States, and (2) that the defendant deprived him of this federal right under color of law. *Jones v. Duncan*, 840 F.2d 359, 360–61 (6th Cir. 1988); 42 U.S.C. § 1983.

I. BACKGROUND

This § 1983 case arises from the death of Lyle Blanchard, who was shot and killed by Defendant Deputy Shane Geers. Plaintiff alleges that on August 30, 2016, Blanchard was driving along the 12300 block of East Knights Way in Bell County, Texas. ECF No. 1 ¶4.1. Geers suspected Blanchard of drunk driving, so he turned on his lights and sirens to pull Blanchard over. *Id.* ¶ 4.3. Blanchard used his turn signal and turned off the public road onto a private road that led to his house. *Id.* ¶ 4.1. After going approximately 1,000 feet down the private road, Blanchard stopped and exited his vehicle unprompted by Geers. *Id.* Geers did not turn off his siren to facilitate communication. *Id.* ¶ 4.2. Plaintiff alleges that Blanchard heard no instructions or commands from Deputy Geers after Blanchard got out of his

vehicle. *Id.* Blanchard then reached down to the lower front pocket of his cargo shorts, unprompted by Geers. *Id.* ¶ 4.5. It was at this moment Plaintiff alleges Defendant Geers fired four shots at Blanchard. *Id.* Plaintiff alleges that after Blanchard fell to the ground, clearly incapacitated and gravely injured, Geers fired four more shots at him. *Id.* ¶ 4.6. Blanchard, who it turned out was unarmed, died from his wounds at the scene. *Id.* ¶ 4.9.

During the aftermath, Geers spoke with Defendant Hatfield, a Texas Ranger employed by the Texas Department of Public Safety, to obtain a warrant to search Blanchard's home to investigate reports of an alleged aggravated assault. *Id.* ¶ 4.10. Plaintiff alleges that Hatfield conducted his own investigation, and then drafted and signed an affidavit to apply for the warrant. *Id.* Plaintiff contends it was improper that Hatfield failed to inform the judge that Blanchard had been shot and killed and that no gun was found at the scene. *Id.* ¶ 4.11. In addition, Plaintiff alleges that Hatfield improperly included information about a prior incident in which Harker Heights Police were called in response to Blanchard threatening to shoot airplanes, despite the fact that Hatfield was aware the legal authorities believed Blanchard was not a threat. *Id.* Authorities executed a search, but no incriminating items were found. *Id.* ¶ 4.13.

In the Plaintiff's Complaint, filed on July 26, 2018, Plaintiff asserts causes of action against Deputy Geers, his employer Bell County, and Jim Hatfield.

II. LEGAL STANDARD

Upon motion or sua sponte, a court may dismiss an action that fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court accepts all well-pleaded facts as true, viewing them in the light most favorable to the non-movant. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). To survive a motion to dismiss, a non-movant must plead enough facts to state a claim to relief that is both legally cognizable and plausible on its face, but the court should not evaluate the plaintiff's likelihood of success. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Lone Star Fund V (US.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010).

When the non-movant pleads factual content that allows the court to reasonably infer that the movant is liable for the alleged misconduct, then the claim is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plausibility standard, unlike the "probability requirement," requires more than a sheer possibility that a defendant acted unlawfully. *Id.* The pleading standard does not require detailed factual allegations but demands greater specificity than an unadorned, "the-defendant-unlawfully-harmed-me accusation." Fed. R. Civ. P. 8(a)(2); *Iqbal*, 556 U.S. at 678. A pleading that offers "labels and conclusions," "naked assertion[s]" devoid of "further factual enhancement," or "a formulaic

recitation of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555, 557. Evaluating the plausibility of a claim is a context specific process that requires a court to draw on its experience and common sense. *Iqbal*, 556 U.S. at 679.

III. DISCUSSION

Title 42 U.S.C. § 1983 creates a cause of action against any person who, under color of law, causes another to be deprived of a federally protected constitutional right. Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state ... 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....

42 U.S.C. § 1983.

Congress promulgated § 1983 to prevent a government official's "[m]isuse of power, possessed by virtue of state law and made possible only because the [official] is clothed with the authority of state law." *Johnston v. Lucas*, 786 F.2d 1254, 1257 (5th Cir. 1986); *see also Whitley v. Albers*, 475 U.S. 312 (1986) (Eighth Amendment); *Davidson v. Cannon*, 474 U.S. 344 (1986) (Fourteenth Amendment); *Daniels v. Williams*, 474 U.S. 327 (1986) (Fourteenth Amendment).

However, § 1983 does not grant a cause of action for every action taken by a state official. *Whitley*, 475 U.S. at 319.

Section 1983 requires two allegations to state a cause of action. First, the plaintiff must allege that some person has deprived him of a federal right. *Randolph v. Cervantes*, 130 F.3d 727, 730 (5th Cir. 1997). Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. *Id.* Plaintiff has sufficiently pled that Defendants in this case are state actors and that Geers and Hatfield were acting within the scope of their employment and duties.

a. Claims Against Bell County

The Court will first address Plaintiff's claims against Bell County. The Plaintiff alleges liability on the basis that Bell County acted with deliberate indifference with respect to its training and supervision concerning the reasonable use of force. ECF No. 1 ¶ 6.1. Plaintiff alleges that the County failed to train Deputy Geers to use force based on objective facts available to him at the time of the incident. *Id.* In summary, Plaintiff alleges that the use of deadly force in this manner was "manifestly unreasonable."[1] Plaintiff also alleges the County is liable

[1] To the extent that plaintiff intimates that the use of deadly force in a situation where a law enforcement officer confronts a suspect is, in and of itself, manifestly unreasonable, is rebutted by the very recent holding in the case of *Shumpert v. City of Tupelo*. 905 F.3d 310 (5th Cir. 2018).

for its failure to adequately discipline or reprimand the Deputy for his conduct resulting in a "ratification" of the wrongful use of deadly force. *Id.* ¶ 6.2.

To state a viable cause of action against a municipality under § 1983, a plaintiff must allege: (1) a policymaker; (2) a policy or custom; and (3) a violation of constitutional rights whose "moving force" is the policy or custom. *Valle v. City of Houston*, 613 F.3d 536, 541–42 (5th Cir. 2010).

Plaintiff has left the original complaint completely devoid of any references to a policymaker, and therefore fails to sufficiently plead a claim against Bell County. This failure alone is fatal to the claims against the County and is independently dispositive. It is concerning to the Court that Plaintiff filed this Complaint without naming a policymaker, especially since she already amended her prior complaint three times without fixing the issue in her first suit, *Nanette Blanchard-Daigle, as Representative of the Estate of Lyle Blanchard v. Shane Geers, Bell County, Texas, and Jim Hatfield*, Cause No. 6:17-cv-00078-RP ("First Lawsuit"). Most concerning of all, Plaintiff has still failed to allege a policymaker despite being explicitly told of the deficiency by United States Magistrate Judge Manske in his Report and Recommendation for Plaintiff's prior suit. First Lawsuit ECF No. 24 at 5.

Out of an abundance of caution, this Court will analyze the allegations as to the policy or custom element anyway. An official policy must be either

unconstitutional or have been adopted "with deliberate indifference to the known or obvious fact that such constitutional violations would result." *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 309 (5th Cir. 2004). "Deliberate indifference is a degree of culpability beyond mere negligence or even gross negligence; it 'must amount to an intentional choice, not merely an unintentionally negligent oversight.' " *James v. Harris Cty.*, 577 F.3d 612, 617–18 (5th Cir. 2009) (quoting *Rhyne v. Henderson Cty.*, 973 F.2d 386, 392 (5th Cir. 1992)) "These requirements must not be diluted, for '[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability.' " *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998) (alteration in original) (quoting *Bd. of Cty. Comm'rs of Bryan Cty., v. Brown*, 520 U.S. 397, 415 (1997)).

Here, to the extent that the Court can ascertain what the Plaintiff is alleging, it appears that the Plaintiff alleges a policy or custom evidenced either (1) by the County's failure to adequately train its police officers in the proper use of force, or (2) by the County's ratification of Geers' actions in failing to discipline or reprimand him. ECF No. 1¶¶ 6.1–6.2. The Court has taken into consideration the declaration of Roger Clark submitted by the Plaintiff.

1. Failure to Train or Supervise

Plaintiff first asserts that Bell County failed to provide Deputy Geers with supervision and training regarding the reasonable use of force. *Id.* ¶ 6.1. Specifically, Plaintiff contends that Bell County failed to train Geers on how to use appropriate force based on objective facts available to him at the time of the incident. *Id.* "In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizen's rights may rise to the level of an official government policy for purposes of § 1983." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). In order to plead a plausible failure-to-train claim, a plaintiff must allege facts that show that (1) the municipality's training procedures were inadequate, (2) the municipality was deliberately indifferent in adopting its training policy, and (3) the inadequate training policy directly caused the constitutional violation. *Sanders-Burns v. City of Plano*, 594 F.3d 366, 381 (5th Cir. 2010). Plaintiff makes a conclusory and facial attempt to plead the first and third elements in her Complaint, but completely fails to sufficiently plead the deliberate indifference element. ECF No. 1 ¶¶ 5.1–5.4, 6.1.[2]

[2] Mr. Clark offers the conclusion in his report that "BCSD policy facilitated the unreasonable and excessive force that occurred and reflected a deliberate indifference to the life and safety of Mr. Lyle Blanchard." ECF No. 1 at 30. The Court notes that Mr. /Clark may have included the proper "buzz words" in his report; however, he offers no factual basis for his opinion and as such it also is insufficient. *See Twombly*, 550 U.S. at 555, 557.

To meet the pleading burden of deliberate indifference, a plaintiff must ordinarily allege that the municipality had actual or constructive notice of a pattern of similar constitutional violations. *Connick*, 563 U.S. at 62–63. "Prior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question." *Estate of Davis v. City of North Richland Hills*, 406 F.3d 375, 383 (5th Cir. 2005). "While the specificity required should not be exaggerated, our cases require that the prior acts be fairly similar to what ultimately transpired and, in the case of excessive use of force, that the prior act have involved injury to a third party." *Id.* Plaintiff fails to allege such a pattern or notice.

In *Estate of Davis*, the Fifth Circuit reversed the district court, holding that the inappropriate use of a gun during training did not constitute a pattern of violations because "no one's constitutional rights were violated and [defendant] never used excessive force against a third party." *Id.* at 384. Here, Plaintiff points only to the County's reprimand of Geers during a training exercise. ECF No. 1¶ 5.3. Plaintiff does not include critical details of this incident, and states that "[i]n August 2014 Geers was reprimanded for poor participation and unbecoming behavior during a Firearms Electronic Simulator." *Id.* Plaintiff does not allege facts in sufficient detail to relate the training incident to the tragedy that occurred in this case. Similar to *Estate of Davis*, this previous incident occurred during training and

did not violate any third party's constitutional rights. ECF No. 1 ¶ 5.3; *Estate of Davis*, 406 F.3d at 383–84. Because the training incident in this case falls clearly outside the Fifth Circuit's definition of prior acts, and because Plaintiff does not allege any instances of Geers using excessive force against a third party, Plaintiff fails to show a pattern of similar incidents. *Estate of Davis*, 406 F.3d at 383–84.[3]

A plaintiff may, however, establish deliberate indifference by asserting the rare single-incident exception, which applies when the injury suffered is a "patently obvious" or "highly predictable" result of inadequate training. *Connick*, 563 U.S. at 63–64. The Supreme Court has hypothesized the exception may apply, "[when a municipality] arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force." *Id.* (citing *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989)). "The Court theorized that a city's decision not to train the officers about constitutional limits on the use of deadly force could reflect the city's deliberate indifference to the 'highly predictable consequence,' namely, violations of constitutional rights." *Id.* (quoting *Bryan County v. Brown*,

[3] Mr. Clark also offers the opinion in his report that "There are indications in the record that the BCSD has a pattern and practice of improper high risk vehicle approaches as evidenced by many other cases of improper shooting." ECF No. 1, at 30. Unfortunately, Mr. Clark has failed to write what the "indications" are that he is discussing and what other cases he is referencing. Therefore, this conclusory allegation is not enough to show a pattern of similar incidents.

520 U.S. 397, 409 (1997)). The Fifth Circuit has applied the exception in a case where:

> [T]he sheriff hired as a deputy one of his relatives who had multiple prior arrests and convictions for violent crimes and other reckless behavior, as well as an outstanding arrest warrant. The deputy received no training whatsoever, and, without any provocation, he used a violent 'arm bar' technique to take down an unarmed suspect.

Roberts v. City of Shreveport, 397 F.3d 287, 295 (5th Cir. 2005) (citing *Brown v. Bryan County*, 219 F.3d 450, 454–55 (5th Cir. 2000)). In this case, Plaintiff's claim is distinguishable from the Supreme Court's hypothetical and the past Fifth Circuit application of the exception. Rather, the Complaint alleges that the County provided some use-of-force training and reprimanded those who performed poorly, including Geers. ECF No. 1 ¶5.3.

Moreover, Plaintiff fails to provide any cases involving similar facts to the instant case where the single-incident exception was applied. In fact, the Fifth Circuit has broadly refused to apply the exception except in the most extreme cases. *See Peterson v. City of Fort Worth*, 588 F.3d 838, 849 (5th Cir. 2009); *Roberts*, 397 F.3d at 295; *Estate of Davis*, 406 F.3d at 385–86; S*aenz v. City of El Paso*, 637 F. App'x 828, 832 (5th Cir. 2016) (per curiam); *Speck v. Wiginton*, 606 F. App'x. 733, 736–37 (5th Cir. 2015) (per curiam). Because Plaintiff fails to sufficiently allege a pattern of similar constitutional violations or the single-

incident exception, Plaintiff does not sufficiently plead a failure-to-train claim. *Connick*, 563 U.S. at 62–64.

2. Failure to Discipline or Reprimand

Plaintiff next asserts that Bell County's failure to discipline or reprimand Geers constitutes a ratification of Geers' constitutional violations. ECF No. 1¶ 5.2. In *Grandstaff v. City of Borger*, the Fifth Circuit concluded that because Defendants resorted to "unworthy, if not despicable, means to avoid legal liability," and because the officers received no reprimands or discharges from the city following a flagrant use of excessive force, there must have been a preexisting disposition and policy of reckless disregard for life. 767 F.2d 161, 166, 171–72 (5th Cir. 1985). *Grandstaff* has not enjoyed wide application in the Fifth Circuit, and, in fact, "the *Grandstaff* panel emphasized the extraordinary facts of the case, and its analysis can be applied only to equally extreme factual situations." *Snyder*, 142 F.3d at 797 (quoting *Coon v. Ledbetter*, 780 F.2d 1158, 1161 (5th Cir. 1986)). The Western District of Texas has adhered to the Circuit's instruction that the "ratification theory is only available in 'the most extreme factual situations.' " *Schaefer v. Whitted*, 121 F. Supp. 3d 701, 720 (W.D. Tex. 2015) (quoting *Davis v. Montgomery County*, No. H:07-505, 2009 WL 1226904, at *8 (S.D. Tex. Apr. 30, 2009) (quoting Fifth Circuit cases)). As pled, Plaintiff's ratification argument fails to meet the limited factual circumstances for a ratification claim.

Although the County never reprimanded or disciplined Geers after this single incident, Geers' actions in this case as pled are eclipsed by the extreme factual situation found in *Grandstaff*. In that case, the entire night shift of the police force engaged in a high-speed pursuit of a suspect after a minor traffic violation. *Grandstaff*, 767 F.2d at 165–66. The chase ended on a private ranch where the officers lost the suspect as he fled on foot. *Id.* The foreman of the ranch approached the scene in his pickup truck once, but promptly returned to his house, about 200 yards away, to secure his family. *Id.* As he approached a second time, the officers opened fire on him from both sides. *Id.* He was able to get out of the truck, but was fatally shot in the back in the process. *Id.*

The Fifth Circuit and the Western District of Texas have both refused to expand the rule beyond similarly extreme factual circumstances. *See Snyder*, 142 F.3d at 797–98 (refusing to apply the rule where a single officer shot a fleeing suspect); *Barkley v. Dillard Dept. Stores, Inc.*, 277 F. App'x 406, 413 (5th Cir. 2008) (refusing to apply the rule where an off-duty officer shot a fleeing shoplifter); *Schaefer*, 121 F. Supp. at 720 (refusing to apply the rule where an officer attempted to disarm and then shot an individual legally armed on his own property); *Gonzales v. Westbrook*, 118 F. Supp. 2d 728, 739 (W.D. Tex. 2000) (refusing to apply the rule where a 270 pound deputy intentionally tackled and injured an 87 pound minor). Unlike *Grandstaff*, this case involves a single officer

pursuing a potentially intoxicated driver. ECF No. 1 ¶ 4.3. The driver refused to promptly pull over, led the officer away from public view, exited his vehicle unprompted, and reached for his pocket for a reason unknown to the officer. ECF No. 1 ¶¶ 4.1–4.5. Officers make mistakes in the line of duty, and these mistakes may have tragic consequences for citizens and for the officers; however, this case, as pled, simply does not rise to the level of flagrancy, "gross ... abuse," "dangerous recklessness," or "incompetent and catastrophic performance." *Grandstaff*, 767 F.2d at 171.

The Fifth Circuit has warned that "the inferences permitted by the *Grandstaff* opinion approach dangerously close to dissolving the direct liability rationale of *Monell* and imposing respondeat superior liability upon a municipality. Precisely because of this danger, the Fifth Circuit has expressly limited *Grandstaff* to 'equally extreme factual situations.' " *Gonzales*, 118 F. Supp. 2d at 738 (quoting *Coon*, 780 F.2d at 1161). Plaintiff has flatly failed to plead such extreme circumstances, and the Court refuses to expand the ratification theory to the facts of this case.

b. Claims Against Deputy Shane Geers

Turning now to Deputy Geers, Defendants argue that even if Plaintiff has alleged a constitutional violation, Geers is entitled to qualified immunity. ECF No.

9 at 15. There is a high burden to overcome when combating a claim of qualified immunity, and Plaintiff has not succeeded in this case.

The doctrine of qualified immunity shields government officials, who performing discretionary functions in the course of their official duties, from liability as well as from suit. *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995). Qualified immunity protects officials unless their conduct violates clearly established constitutional rights. *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008) (citing *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003)). It provides protection "to all but the plainly incompetent or those who knowingly violate the law." *McCully v. City of N. Richland Hills*, 406 F.3d 375, 380 (5th Cir. 2005) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Plaintiff has the burden of negating a properly raised qualified immunity defense. *Wyatt v. Fletcher*, 718 F.3d 496, 502 (5th Cir. 2013) (citing *Michalik v. Hermann*, 422 F.3d 252, 258 (5th Cir. 2005)). To overcome the defense, a plaintiff must show (1) that the official violated a statutory or constitutional right; and (2) that the official's actions were objectively unreasonable in light of the clearly established law. *Id.* at 502-03. The court may address either prong of the test first depending on the circumstances of the case. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The plaintiff must allege specific conduct that gave rise to the constitutional violation "with 'factual detail and particularity,' not mere conclusory

allegations." *Anderson v. Pasadena Indep. Sch. Dist.*, 184 F.3d 439, 443 (5th Cir. 1999) (quoting *Jackson v. Widnall*, 99 F.3d 710, 715–16 (5th Cir. 1996)).

To state an excessive use of force claim and thus satisfy the first element, Plaintiff must plead "(1) an injury (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness was clearly unreasonable." *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009) (quoting *Freeman v. Gore*, 483 F.3d 404, 416 (5th Cir. 2007)). "The court 'must consider all of the circumstances leading up to [the moment deadly force is used], because they inform the reasonableness of [the officer's] decisionmaking.' " *Romero v. City of Grapevine*, 888 F.3d 170, 177 (5th Cir. 2018) (alterations in original) (quoting *Mendez v. Poitevent*, 823 F.3d 326, 333 (5th Cir. 2016)). Use of deadly force is presumptively reasonable when the officer has "reason to believe that the suspect poses a threat of serious harm to the officer or to others." *Ontiveros*, 564 F.3d at 382 (citing *Mace*, 333 F.3d at 623). "If officers of reasonable competence could disagree as to whether the plaintiff's rights were violated, the officer's qualified immunity remains intact." *Griggs v. Brewer*, 841 F.3d 308, 313 (5th Cir. 2016) (quoting *Tarver v. City of Edna*, 410 F.3d 745, 750 (5th Cir. 2005)).

In *Manis v. Lawson*, the plaintiff was passed out in his car when officers approached him and opened the door. 585 F.3d 839, 842 (5th Cir. 2009). At some

point after the plaintiff was roused, he reached under his seat for an unknown object. *Id.* The plaintiff failed to follow instructions, and the officers shot him. Id. The Fifth Circuit held that summary judgment should have been granted in favor of the officers. Id. at 847. In *Ontiveros*, an officer shot the plaintiff during an attempted arrest when the plaintiff was holding and reaching into a boot. 564 F.3d at 381. The officer believed that the plaintiff may have had a weapon. *Id.* The Fifth Circuit affirmed summary judgment for the officer. *Id.* at 385. In *Reese v. Anderson* the plaintiff's hand was concealed behind the door of a car. 926 F.2d 494, 496 (5th Cir. 1991). "[The officer] continued to caution and threaten [the plaintiff] of the consequences of not cooperating, but [the plaintiff] failed to raise both hands and follow the commands of the officer." *Id.* at 497 (quoting the district court). The officer shot and killed the plaintiff. Id. The Fifth Circuit again held that qualified immunity should have been granted to the officer. *Id.* at 501.

The Court must judge the reasonableness of Geers' actions "from the perspective of a reasonable officer on the scene" and "in light of the facts and circumstances confronting [the officer], without regard to [the officer's] underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 396–97 (1989). Plaintiff's pleadings allege the following facts: (1) Geers suspected Blanchard of being intoxicated and initiated a traffic stop with his lights and siren; (2) Blanchard did not promptly stop on a main road, but traveled 1000 feet (nearly a fifth of a mile)

down a private road; (3) Blanchard opened his door, exited his vehicle, and turned toward Geers unprompted; and (4) Blanchard reached toward his pocket for some reason unknown to Geers. ECF No. 1 ¶¶ 4.1–4.5.

Based on the facts as pled by Plaintiff and existing Fifth Circuit law as discussed above, the Court finds that reasonable officers could have interpreted Blanchard's actions as drawing an immediately dangerous weapon and, thus, as a sufficient threat. Furthermore, the Court finds that the law is not clearly established such that reasonable officers could not have disagreed about the legality of Geers' actions. Therefore, the Court holds that Geers is entitled to qualified immunity at this stage of the proceedings.

c. Claims Against Jim Hatfield

Plaintiff also alleges that Hatfield obtained a search warrant that was executed at Blanchard's residence sometime after the shooting. ECF No. 1 ¶¶ 4.10–4.13, 6.3. She alleges that the warrant was illegal and invalid because Hatfield omitted the facts that Blanchard did not have a gun when he was shot and that he was also already dead at the time of the warrant request. *Id.* Plaintiff also alleges that when Hatfield requested the warrant he improperly stated that Blanchard had a violent criminal history. *Id.* ¶ 4.11. Therefore, Plaintiff is seeking nominal damages via this civil action for the alleged unconstitutional search that occurred after Blanchard's death. *Id.* ¶ 7.2.

Blanchard did not retain his Fourth Amendment protections against unconstitutional searches after he died. *Whitehurst v. Wright*, 592 F.2d 834, 840 (5th Cir. 1979) ("After death, one is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived."). Because Blanchard did not have Fourth Amendment protections at the time of the alleged unconstitutional search, Plaintiff's claims that Hatfield violated Blanchard's Fourth Amendment rights are without merit. Therefore, this Court dismisses Plaintiff's claims against Hatfield for failing to state a valid claim for which relief can be granted.

d. Roger Clark's Report

The biggest difference between Plaintiff's Second Amended Complaint in her First Lawsuit and her current Complaint is that she has attached Roger Clark's expert report to her current Complaint. Despite attaching the report, Plaintiff's claims are still subject to a Rule 12(b)(6) dismissal.

The first issue with Mr. Clark's report is that it is primarily a restatement, albeit in more detail, of the factual allegations Plaintiff already made in her Complaint. According to Mr. Clark's report, (1) Geers suspected Blanchard of being under the influence and turned on his lights and sirens; (2) Blanchard did not stop promptly, but rather traveled 1000 feet down a private road; (3) Blanchard opened the door, exited the vehicle, and turned toward Geers unprompted; and (4)

Blanchard reached toward his pocket for some reason unknown to Geers. ECF No. 1, at 16–19. As discussed above, these factual allegations are not enough to prevent dismissal under Rule 12(b)(6).

Mr. Clark's report also contains improper conclusions and opinions about the reasonableness of Geers' use of force. For instance, he writes that "Deputy Geers' actions constituted unreasonable and excessive force and reflected a deliberate indifference to the life and safety of Mr. Blanchard." *Id.* at 29. He also offers his opinion that "the existing BCSD policy facilitated the unreasonable and excessive force that occurred and reflected a deliberate indifference to the life and safety of Mr. Lyle Blanchard." *Id.* Unfortunately for Plaintiff, the reasonableness of the use of force is a legal issue. *United States v. Williams*, 343 F.3d 423, 435 (5th Cir. 2003); see also *United States v. Teel*, 299 F. App'x 387, 389 (5th Cir. 2008) ("the district court properly barred Teel's expert from going beyond consideration of the conduct to offer legal conclusions regarding whether the assault on Williams constituted excessive force"). The federal rules do not allow a witness to give legal conclusions about legal issues. *Owens v. Kerr-McGee Corp*., 698 F2d. 236, 240 (5th Cir. 1983); *see also Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992) (use of force expert's opinions that officer's use of force was not "justified under the circumstances," not "warranted under the circumstances," and "totally improper"

were excluded as improper opinions on legal issues). Therefore, Mr. Clark is not able to offer legal conclusions about whether Geers' use of force was excessive.

Finally, Mr. Clark has offered various other inadequate opinions and conclusions about whether Bell County adequately trained Geers, whether Geers departed from required tactics, or whether it was common police procedure to investigate a dead man. ECF No. 1 at 20, 29. These opinions are all based upon the same inadequate facts that Plaintiff stated in her Complaint. ECF No. 1 ¶¶4.1–4.5, 4.10–4.13. Therefore, they are nothing more than "labels and conclusions" based on insufficient factual allegations and cannot prevent dismissal. *Twombley*, 550 U.S. at 555.

e. Attorney's Fees

Generally, each party bears the cost of their own attorney unless entitled to attorney's fees by contract or statute. Attorney's fees may be awarded in a suit alleging violations of 42 U.S.C. § 1983 by authority of 42 U.S.C. § 1988(b). Under 42 U.S.C. § 1988(b), "the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." However, § 1988 only "authorizes a district court to award attorney's fees to a defendant 'upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation.' " *Fox v. Vice*, 563 U.S. 826, 832 (2011) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)); *see also Dean v. Riser*, 240 F.3d 505, 508 (5th Cir.

2001) (“Thus, attorney's fees for prevailing defendants are presumptively unavailable unless a showing is made that the underlying civil rights suit was vexatious, frivolous, or otherwise without merit.”).

“A suit is frivolous if it ‘so lacking in arguable merit as to be groundless or without foundation rather than whether the claim was ultimately successful.’ ” *Walker v. City of Bogalusa*, 168 F.3d 237, 240 (5th Cir. 1999) (quoting *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1140 (5th Cir. 1983)). In determining whether a suit is frivolous, the district court should consider (1) whether the plaintiffs established a prima facie case, (2) whether the defendants offered to settle, and (3) whether the Court dismissed the case or held a full trial. *Walker*, 168 F.3d at 240. District courts are to be granted “substantial deference” to make determinations regarding what fees would have been avoided but-for a plaintiff's frivolous claims, “tak[ing] into account the overall sense of a suit.” *Id.* at 838.

In this case, awarding attorney's fees to Defendants Shane Geers and Bell County is proper because Plaintiff's claims are frivolous. As already discussed above, Plaintiff has not pled a prima facie case showing that she is entitled to relief. If that were the only issue, however, this Court would not make an award of attorney's fees to Defendants. The real issue arises when the Court considers the fact that Plaintiff's attorneys filed the same complaint twice while failing to correct the issues Magistrate Judge Manske identified. In the First Lawsuit, Plaintiff's

attorneys filed a Second Amended Complaint which contained the same basic factual and legal allegations that Plaintiff pleads in this current suit. First Lawsuit, ECF No. 12. After Defendants filed a Motion to Dismiss Plaintiffs Second Amended Complaint, Judge Manske issued a Report and Recommendation in which he recommended all Plaintiff's claims be dismissed with prejudice pursuant to Rule 12(b)(6). First Lawsuit, ECF Nos. 15 & 24. Plaintiff's attorneys subsequently filed a Notice of Voluntary Dismissal of Plaintiff's First Lawsuit before this Court could issue an order adopting the Report and Recommendation. First Lawsuit, ECF No. 25. Astonishingly, Plaintiff's attorneys then filed the Complaint in this current lawsuit which is an almost identical copy of the Second Amended Complaint. ECF No. 1; First Lawsuit, ECF No. 12.

Plaintiff's attorneys have failed to plead new facts or correct any issues that Judge Manske explicitly identified in his Report and Recommendation. As such, they have wasted both this Court's time and Defendants' time and money. Therefore, they filed a frivolous claim and the Court orders that Plaintiff's attorneys pays Defendants Geers and Bell County's attorney's fees for the work their attorneys performed when writing their Motion to Dismiss and Reply in this case. ECF Nos. 9 & 15.

In determining the amount of fees to be awarded, the Court is directed to consider the *Johnson* factors. *EEOC v. Agro Distribution*, 555 F.3d 462, 473 (5th

Cir. 2009); *see also Cobb v. Miller*, 818 F.2d 1227, 1231 (5th Cir. 1987). These factors include:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (12) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Blanchard v. Bergeron, 489 U.S. 87, 92, nn.5–6 (1989) (quotations and citations omitted). A specific discussion of each factor is not required. *EEOC*, 555 F.3d at 473. In this case, the rates charged by Defendants Geers and Bell County's attorneys are adequately documented and represent reasonable rates for the time and skill of the attorneys involved. *See* ECF No. 19. Having considered the *Johnson* factors, the Court determines that Plaintiff's attorneys should reimburse Defendants' Geers and Bell County in the total amount of $2,200.00.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Defendants' Motions to Dismiss Plaintiff's Complaint, (ECF Nos. 9 & 11), are **GRANTED**.

IT IS FURTHER ORDERED that all Plaintiff's claims against all Defendants are **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Plaintiff's attorneys Robert I. Ranco and Roberto Flores are to reimburse Defendants Geers and Bell County the amount of $2,200.00 in attorney's fees.

IT IS FINALLY ORDERED that this case is **DISMISSED**

SIGNED on October 29th, 2018.

/s/Alan D. Albright
ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE