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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (SEPTEMBER 2, 2021)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAMELA REILLY, PERSONAL REPRESENTATIVE, ESTATE OF ROSEMARIE REILLY,

Plaintiff-Appellant,

v.

OTTAWA COUNTY, MICHIGAN, A MUNICIPAL CORPORATION; CHRIS DILL, SERGEANT, IN HIS INDIVIDUAL CAPACITY; COLLIN WALLACE, POLICE OFFICER, IN HIS INDIVIDUAL CAPACITY; DENNIS LUCE, SERGEANT, IN HIS INDIVIDUAL CAPACITY; BRANDON DEHAAN, CAPTAIN, IN HIS INDIVIDUAL CAPACITY; SEAN KELLEY; ERIC TUBERGEN, OFFICER, IN HIS INDIVIDUAL CAPACITY,

Defendants-Appellees.

No. 20-2220

On Appeal from the United States District Court for the Western District of Michigan

Before: NORRIS, KETHLEDGE, and NALBANDIAN, Circuit Judges.

ALAN E. NORRIS, Circuit Judge.

This appeal arises from the fatal shooting of Rosemarie Reilly ("Rosemarie") by her estranged boyfriend, Jeremy Kelley ("Jeremy"). Rosemarie's mother, Pamela Reilly, filed suit on behalf of her daughter's estate against Ottawa County, Michigan, and several officers employed by its Sheriff's Department whose actions, or lack thereof, allegedly contributed to Rosemarie's death. The amended complaint also named officers employed by the Grand Valley State University Police Department who interacted with Rosemarie and, like their counterparts in the Sheriff's Department, allegedly increased the likelihood that Jeremy would harm her.[1]

Defendants filed motions to dismiss the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). Those claims include the following: 1) violation of Rosemarie's right to substantive due process under the Fourteenth Amendment; 2) a related *Monell* claim against Ottawa County; and 3) a wrongful death claim against certain individual defendants pursuant to Michigan law. (A fourth claim alleging a civil conspiracy has not been appealed.)

The district court granted the motions to dismiss as to all claims. It subsequently denied a motion to reconsider filed by plaintiff. This appeal followed.

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[1] The amended complaint also named Sean Kelley, Jeremy's father, as a defendant. At the time of the shooting, he served as an officer in the neighboring Bloomfield Township Police Department. Plaintiff has abandoned her claims against him on appeal.

I.

We review the grant of a motion to dismiss based upon Rule 12(b)(6) de novo. *Lipman v. Budish*, 974 F.3d 726, 740 (6th Cir. 2020). In doing so, we "must accept the factual allegations in the complaint as true and construe the complaint in the light most favorable to plaintiff." *Id.* (citing *Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710, 716 (6th Cir. 2005)). With this precept in mind, the following summary tracks the allegations of the amended complaint.

Rosemarie and Jeremy were in a romantic relationship while she was a student at Grand Valley State University ("GVSU"). Although their relationship ended in September 2016, the couple continued to live together throughout the month. On October 1, Rosemarie confided in her mother that she wished to leave Jeremy.

Things began to truly unravel on October 5, when Jeremy told Rosemarie that "he had a gun to his head and was going to shoot himself." Am. Compl. ¶ 20. Because she did not know where Jeremy was, Rosemarie called his father, defendant Sean Kelley, who then tracked his son's cell phone. In the process of locating Jeremy, Mr. Kelley spoke with defendant Collin Wallace and other officers employed by the GVSU police department. Once located, Jeremy was admitted to a local hospital.

The amended complaint alleges that, after his release, Jeremy "began stalking and harassing Rosemarie." Am. Compl. ¶ 23. He contacted her repeatedly on October 7 and led her to believe that he was going to attempt suicide for a second time. Rosemarie res-

ponded by staying with a friend and later at the house of her aunt and uncle, Noreen and David Rose.

The following day Rosemarie and her mother Pam met for lunch. Her mother noticed "that Rosemarie had a crooked nose and facial bruises, and Pam took Rosemarie to the hospital for treatment, where it was determined that she had suffered a broken nose." Am. Compl. ¶ 28. During a telephone call later that day, Jeremy admitted to Mrs. Reilly that "he had hurt Rosemarie." *Id.* ¶ 29. Rosemarie confirmed that statement in a call to her father, telling him that Jeremy would not let her leave their home and had "punched her in the face, arms, and legs several times, causing her broken nose among other injuries." *Id.* ¶ 30.

Over the next three days, Jeremy called Rosemarie 43 times. He also called her aunt and uncle repeatedly. On October 11, Jeremy called her uncle, Mr. Rose, at 11:10 p.m. and "threatened to kill himself, stating that he had a gun to his head." Am. Compl. ¶ 33. For his part, Mr. Rose called the Ottawa County Sheriff's Department ("OCSD") and reported the incident. An OCSD officer telephoned Jeremy but no further action was taken at that time.

The following day, October 12, Jeremy appeared at the GVSU campus and "jumped in front of Rosemarie's car before pounding on the window and head-butting her vehicle." Am. Compl. 1 36. Rosemarie responded by contacting the GVSU police and "report[ing] Jeremy for stalking, domestic violence/abuse, and for putting a gun to her head and threatening to kill her." *Id.* ¶ 37. She spoke to Officer Wallace who contacted the OCSD, which dispatched Sergeant Chris Dill to deliver paperwork to Rosemarie so that she could file

an application for a Personal Protection Order ("PPO"). Sergeant Dill encouraged her to do so.

Meanwhile, Officer Wallace completed a "no trespassing" form barring Jeremy from the campus and prepared an incident report detailing the allegations of stalking. Like Dill, Wallace encouraged Rosemarie to obtain a PPO.

The following day, October 13, Officer Eric Tubergen of the OCSD followed up by visiting Jeremy and telling him to leave Rosemarie alone. He also called Mrs. Reilly and told her that "there was nothing that could be done to prevent Jeremy from calling Rosemarie, that he had seen Jeremy's guns and that Jeremy was legally allowed to own those guns, and that he was 'well aware' that Jeremy's father, Sean Kelley, was a police officer." Am. Compl. ¶ 43. When Mrs. Reilly responded by informing Tubergen that Jeremy had threatened to kill her daughter with a gun, he told her that "Rosemarie needed to file a report." *Id.* ¶ 45. Rosemarie followed up by reporting the incident to Sergeant Dill.

Thereafter, Dill telephoned Jeremy and told him that "he was not going to take Jeremy to jail despite his desire to question him regarding Rosemarie's complaint of domestic violence." Am. Compl. 1 47. Jeremy responded that he was "upset Rosemarie had called the police and he believed she had obtained a PPO at that time." *Id.* ¶ 48.

On the same day, October 13, Brandon DeHaan, a captain with the GVSU police, reviewed the reports prepared by Dill and Wallace. He also spoke with Mrs. Reilly who told him that "Jeremy had several guns and was very unpredictable, and that she was

concerned about Jeremy's father, Defendant Kelley, offering Jeremy bad advice regarding the situation with Rosemarie." Am. Compl. ¶ 50. Captain DeHaan called Jeremy on the same day and told him that he was banned from GVSU property and was not to contact any of the Reilly family members.

On October 16, Mrs. Reilly called Dennis Luce, a sergeant with the OCSD, about retrieving Rosemarie's belongings from the residence that she had shared with Jeremy. An officer from the OCSD met Mrs. Reilly and her daughter at the trailer. Jeremy was also present. According to the amended complaint, "[t]he officer initially was not going to supervise Rosemarie's removal of her things [from] inside the trailer, was going to permit Jeremy and Rosemarie to be alone together while she removed her things, and only did so upon request of the Reilly's [sic]." Am. Compl. ¶ 59.

The following day, October 17, Rosemarie formally picked up the PPO, which prohibited Jeremy from "entering Rosemarie's residence, entering onto GVSU property, following Rosemarie, and contacting Rosemarie by phone or Facebook." Am. Compl. ¶ 60.

Unfortunately, the PPO did not have the desired effect. The very next day Jeremy called Rosemarie three times. Rosemarie reported those calls to Officer Wallace and let him know that Jeremy had stalked her by "entering onto the GVSU campus and following Rosemarie with his vehicle until she ran into a dining hall." Am. Compl. ¶ 62. Despite continued calls from Mrs. Reilly and Rosemarie, "no one attempted to arrest Jeremy." *Id.* ¶ 65. Moreover, "Jeremy told Rosemarie and Jennifer Reilly [Rosemarie's sister] that Jeremy's dad . . . had spoken to the local police and that 'nothing

was going to happen' to Jeremy for violating the PPO." *Id.* ¶ 67.

On October 22, Rosemarie emailed Officer Wallace to let him know that, since the PPO had issued, Jeremy "had tried to contact her 86 times through her phone, left her multiple voicemails, and emailed her University email address on multiple instances." Am. Compl. ¶ 68. Finally, on October 28, OCSD prepared an arrest warrant and mailed it to Jeremy based upon Rosemarie's earlier report of domestic violence. Another warrant, this time based upon Rosemarie's complaint that Jeremy stalked her at GVSU, was mailed on November 2. When Jeremy told Mr. Reilly that he was aware of the arrest warrants, Mr. Reilly advised him to turn himself in.

The tragic ending of this story occurred a few days later:

> [O]n or about November 6, 2016, Jeremy found Rosemarie at a friend's house located at 1450 Lake Dr. SE, Grand Rapids, MI 49605, and, at approximately 3:00 a.m., dragged Rosemarie from the residence by her hair, shot her multiple times in the torso with a black 9 mm Beretta pistol when she attempted to flee back into the house, then shot himself in the head.

Am. Compl. ¶ 77.

In addition to these specific allegations, the complaint also contains assertions of a more general nature: defendants allowed Jeremy to keep possession of a handgun despite their awareness that he had threatened Rosemarie with it; local police "listened and acquiesced to Jeremy's father when he requested

leniency for his son," Am. Compl. ¶ 84; and defendants' regular communication with Jeremy strengthened his belief that nothing was going to happen. In sum, the actions of defendants "constitute an affirmative act that either created the risk or increased the risk of danger to Rosemarie Reilly placing her in substantial risk of serious immediate and proximate harm which was the cause of her death." Am. Compl. ¶ 90.

Prior to discovery, the defendants filed motions to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6). As already mentioned, the district court granted these motions and dismissed the complaint. It subsequently denied plaintiff's motion for reconsideration.

II.

1. Due Process Claim

Plaintiff's allegation that the individual defendants violated her substantive right of due process under the Fourteenth Amendment lies at the heart of her appeal.

In *Lipman*, this court reviewed the history of the state-created danger component of due process:

> The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." In most cases, this means that the government must provide adequate procedural safeguards before it can restrict one of these rights. *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261

> (1992). But some rights—referred to by the courts as fundamental rights—are so important that no amount of procedure alone will do. Rather, the state can only infringe upon these rights if its imposition "is narrowly tailored to serve a compelling state interest," a doctrine referred to as substantive due process. *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)). The right to life and safety through personal security is such a fundamental interest, and therefore is protected by the substantive portion of the Due Process Clause. *Youngberg v. Romeo*, 457 U.S. 307, 315-16, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).
>
> That said, the Constitution concerns the actions of government, not private citizens. And so, while the government cannot infringe upon a fundamental right without a compelling state interest, the state generally is not obligated to protect those rights against harm from private actors. That is the central holding of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197 (1989).

Lipman, 974 F.3d at 740-41. However, while "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause," there are "certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *DeShaney*, 489 U.S. at

197-98. These "limited circumstances" apply in two situations: first, when an individual is in custody of the state; second, when state actors contribute to the dangers posed by private persons to an individual. *Lipman*, 974 F.3d at 741-42 (quoting *DeShaney*, 489 U.S. at 198-201). With respect to the latter category, circuit courts, including ours, have interpreted this exception to *DeShaney* to comprise situations where "the state acts to create or increase the danger of private harm: the state-created danger doctrine." *Id.* (citing *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066-67 (6th Cir. 1998)).

In *Kallstrom*, we held that the City of Columbus placed its undercover police officers in special danger by allowing violent gang members access to their personal information. In reaching our holding, we provided this reasoning:

> Liability under the state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence. As explained by the Seventh Circuit, "[i]f the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). However, because many state activities have the potential to increase an individual's risk of harm, we require plaintiffs alleging a constitutional tort under § 1983 to show "special danger" in the absence of a special

> relationship between the state and either the victim or the private tortfeasor. The victim faces "special danger" where the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large. The state must have known or clearly should have known that its actions specifically endangered an individual.

Kallstrom, 136 F.3d at 1066 (citations omitted). Since *Kallstrom* issued, this court has had occasion to revisit state-created danger claims on numerous occasions. The legal parameters have remained essentially the same, however; each case is extremely fact dependent. In appeals that come to us via motions to dismiss prior to discovery, counsel's framing of the complaint's allegations is critical. Although we review a complaint assuming its allegations to be true, they must make out a colorable claim: "A claim has facial plausibility when the plaintiff pleads factual content . . . that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

While we review the grant of a Rule 12(b)(6) motion to dismiss de novo, *Kaminski v. Coulter*, 865 F.3d 339, 344 (6th Cir. 2017), in our view the district court's opinion provides a balanced analysis of the question presented and we therefore quote it here at some length:

> As a threshold matter, many of the actions taken by Defendants—creating incident reports, giving the decedent paperwork, telling the decedent and Plaintiff to file reports, taking Plaintiff's phone calls, reviewi-

ng reports—are not acts that increased the preexisting danger to the decedent but are acts that arguably made her safer. And the remainder of the acts alleged by Plaintiff are insufficient to state a *DeShaney* claim.

[A] failure to act is not an affirmative act under the state-created-danger theory. *See Engler* [*v. Arnold*], 862 F.3d 571, 576 (6th Cir. 2017). "This is so, even where officers can be seen not only to have ignored or disregarded the risk of injury, but to have condoned it." *Brooks v. Knapp*, 221 F. App'x 402, 407 (2007). And no "affirmative duty to protect arises . . . from the State's . . . expressions of intent to help" an individual at risk. *DeShaney*, 489 U.S. at 200. Accordingly, any alleged failure by Defendants to take Jeremy into custody, take away his firearm or otherwise fail to "follow up" is not actionable under § 1983.

Similarly, under the caselaw, the alleged failure by GVSU Officer Wallace and/or the OCSD officers to personally serve the arrest warrants in this case is also not an affirmative act that states a plausible *DeShaney* claim. *See, e.g*, *Jones v. Union Cty.*, 296 F.3d 417, 430-31 (6th Cir. 2002) (failure to timely serve ex parte PPO on ex-husband was not actionable under *DeShaney*, even though "the Sheriff's Department was well aware of the seriousness of the domestic problems involving [p]laintiff and her ex-husband").

Last, Defendants' conversations with Jeremy, notifying him of the decedent's report and/or

> telling him he was not going to be arrested, are also insufficient to state a *DeShaney* claim. *See, e.g.*, *Brooks*, 221 F. App'x at 406 (holding that the defendant-officers did not do anything "affirmative" to "embolden" the ex-husband by interrogating him but failing to arrest him on the night of the murder); *May v. Franklin Cty. Commis*, 437 F.3d 579, 584-86 (6th Cir. 2006) (officers who merely depart from the scene of a domestic violence call without having taken steps to reduce the risk of harm cannot be held liable under the "state-created danger" exception to *DeShaney*).

(R. 62, Op. and Order, Page ID 436-37) (citations omitted).

On appeal, plaintiff argues that dismissal on the pleadings was premature; because the viability of state-created danger claims is particularly fact-dependent, discovery should have been permitted. *Lipman* took that approach and noted that "we must draw all reasonable inferences in favor of Plaintiffs when assessing whether the facts in their complaint demonstrate a state-created danger." 974 F.3d at 746 (citation omitted).

Plaintiff contends that her complaint pleaded "affirmative acts" on the part of individual defendants, which increased the danger to Rosemarie. First, they provided reassurances to Jeremy that he would not be arrested despite two existing warrants. Second, they "acquiesced" to a request for leniency made by Jeremy's father. Third, both the OCSD and GVSU officers mailed, rather than personally served, arrest warrants to Jeremy. Pointing to *Lipman*, where we

determined that defendant social workers who interviewed an abused child in front of the alleged perpetrators committed an affirmative act that increased the danger to the child, plaintiff argues that her allegations are enough to survive the motions to dismiss: the question is whether one can plausibly infer that the defendant officers' actions increased Rosemarie's risk of harm from Jeremy.

Although we accept the amended complaint's allegations to be true in the context of a motion to dismiss, we conclude that they fall short of stating a colorable state-created danger claim. Chief Justice Rehnquist began his majority opinion in *DeShaney* with the simple statement, "The facts of this case are undeniably tragic." 489 U.S. at 191. Since that decision, which at least tacitly created a state-created danger component of the Fourteenth Amendment's Due Process Clause, nearly every decision contains similar language, usually in the context of denying a claim. This appeal is no different. Clearly, the events that led up to Rosemarie's murder, which unfolded over the course of a month, could have been avoided. That said, plaintiffs who advance a claim of state-created danger face a high hurdle; they must show that the injured party was "safer before the state action than he was after it." *Lipman*, 974 F.3d at 744 (quoting *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003)). This case involves inaction of the part of defendants, not actions that put Rosemarie at increased risk. In fact, the actions taken—advising Rosemarie to obtain a PPO, accompanying her to retrieve her belongings, advising Jeremy to stop contacting Rosemarie, and obtaining arrest warrants—were all appropriate. Essentially, plaintiff takes issue with defendants'

failure to follow through in a timely and forceful manner. But since that does not identify an affirmative act that created a danger to Rosemarie that did not exist before defendants became involved, it cannot support a viable claim.

Finally, a few words about plaintiff's claim that the officers "emboldened" Jeremy by leading him to believe that "nothing was going to happen" to him and by failing to arrest him or take away his guns, which in turn led to Rosemarie's death. Am. Compl. ¶ 87. These assertions fall far short of alleging that the officers actually encouraged Jeremy to harm her by implying that he would be immune from prosecution should he do so. As explained above, a viable duty to protect claim would require that an affirmative act increased the chance that Rosemarie would be exposed to an act of violence by Jeremy. *Cartwright*, 336 F.3d at 493; *see also, Jones v. Reynolds*, 438 F.3d 685, 695-96 (6th Cir. 2006) (noting that plaintiffs who claim state actors "encourage[d] private illegal acts" still must show the "officers' actions either created or increased the risk of harm to [the victim]") (emphasis added). The facts as pleaded in the amended complaint simply fail to show, as they must, that defendants took any affirmative action that exposed Rosemarie to any danger to which she was not already exposed. *Reynolds*, 438 F.3d at 696. That being so, her claim was properly dismissed.

2. Liability of Ottawa County

The second count of the complaint alleged liability on the part of Ottawa County based upon *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Specifically, it alleged that policymaking officials failed to implement

procedures to "protect individuals, such as Rosemarie Reilly, from individuals with violent tendencies or who had PPOs against them; . . . [and] from individuals against whom arrest warrants had been issued." Am. Compl. ¶ 104. The complaint also alleged failure to "establish, implement, and/or execute adequate policies . . . that ensured officers from different police departments—Defendant Kelley—could improperly influence investigations and/or police conduct." *Id.*

The district court recited these allegations and summarized the arguments of the parties before concluding:

> Given this Court's holding that Count I is properly dismissed, Count II is likewise properly dismissed. Moreover, Plaintiff fails to allege more than a single instance of a substantive due process violation like that alleged in this case. "A failure-to-train claim . . . requires a showing of prior instances of unconstitutional conduct demonstrating that the municipality had ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013). In short, Plaintiff fails to state a plausible *Monell* claim against Ottawa County.

(R. 62, Op. and Order, Page ID 440.)

Plaintiff understandably accords relatively little space to this assignment of error in her brief. Essentially, she concedes that, if we affirm the district court as to Count I, then her claim against the County

fails. We agree that the district court correctly dismissed this claim and affirm on its reasoning.

3. Wrongful Death Claim

As mentioned earlier, the amended complaint also included a state-law claim for wrongful death, Mich. Comp. Laws § 600.2922, based upon the same facts alleged in the federal claims. The amended complaint alleged that defendants' actions were "intentional, wanton and willful, and/or grossly negligent and Defendants are therefore not entitled to government immunity under state law, MCL § 691. 1407." Am. Compl. ¶ 113. Further, "Defendants' gross negligence was a proximate cause of the injuries, including the death of Plaintiff's decedent." *Id.* ¶ 114.

Michigan's governmental immunity statute shields a government official from tort liability when the official's "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." Mich. Comp. Laws § 691.1407(2)(c).

The district court found for defendants on this issue based upon proximate cause: Michigan's wrongful death statute provides that

> [w]henever the death of a person . . . shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages. . . .

Mich. Comp. Laws § 600.2922(1).

Under Michigan's governmental immunity statute, however, an officer is immune from tort liability when the following three requirements are met:

> (1) the officer "is acting or reasonably believes he or she is acting within the scope of his or her authority," (2) "[t]he governmental agency is engaged in the exercise or discharge of a governmental function," and (3) the officer's "conduct does not amount to gross negligence that is the proximate cause of the injury or damage."

Mich. Comp. Laws § 691.1407(2). The Michigan Supreme Court long ago defined "the proximate cause" as "the immediate efficient, direct cause preceding the injury." *Robinson v. City of Detroit*, 613 N.W.2d 307, 319 (Mich. 2000) (quoting *Stoll v. Laubengayer*, 140 N.W. 532, 534 (Mich. 1913)). The Michigan Supreme Court has instructed that "a proper proximate cause analysis must assess foreseeability and the legal responsibility of the relevant actors to determine whether the conduct of a government actor, or some other person, was 'the proximate cause,' that is, as our caselaw has described it, 'the one most immediate, efficient, and direct cause' of the plaintiff's injuries." *Ray v. Swager*, 903 N.W.2d 366, 369 (Mich. 2017). As the Sixth Circuit has observed, "proximate cause is a high bar" under the statute. *Walker v. Detroit Pub. Sch. Dist.*, 535 F. App'x 461, 467 (6th Cir. 2013).

> Plaintiff's pleading does not meet this high bar. As Defendants point out, Plaintiff expressly alleges in her Amended Complaint that the alleged conduct of Defendants was "a proximate cause," not the proximate cause of the decedent's injuries. And, viewing the Amended Complaint in the light most favorable to Plaintiff, accepting as true all well-pled factual allegations and drawing all reasonable inferences in favor of Plaintiff, "the one most immediate, efficient, and direct cause" of the decedent's injuries was clearly Jeremy's conduct, not any alleged actions or inactions by Defendants. *See* Am. Compl. ¶ 16 ("Rosemarie was shot and killed at approximately 3:00 a.m. on November 6, 2016 by her ex-boyfriend, Jeremy Kelley. . . ."). Plaintiff has therefore not pleaded a plausible wrongful death claim in avoidance of governmental immunity.

(R. 62, Op. and Order, Page ID 441-43) (citation omitted).

Plaintiff contends that dismissal of this cause of action on the pleadings was premature because gross negligence is a question of fact for a jury to determine. However, as the passage of the district court's analysis of this claim makes clear, it assumed that the actions alleged could constitute gross negligence and focused instead upon the proximate cause requirement.

On this point, plaintiff contends that the district court misread, or misapplied, *Ray v. Swager*, 903 N.W.2d 366 (Mich. 2017), by "weighing" factual causes. *Swager* held that a cross-country coach, who told his team to cross a street despite a no-walk signal, was

not entitled to governmental immunity even though the driver of the vehicle that struck two team members was the immediate cause of the injuries. *Id.* at 378. By analogy, plaintiff urges us to view the facts of our case in a similar light: yes, it is undeniable that Jeremy was the direct proximate cause of Rosemarie's death; that does not mean, however, that defendants cannot be seen, like the cross-country coach, to be the proximate legal cause.

However, proximate cause means the one most immediate, efficient, and direct cause preceding an injury, and not simply a proximate cause. *Robinson v. City of Detroit*, 613 N.W.2d 307, 319 (Mich. 2000). No matter how one reads *Swager*, it explicitly affirms *Robinson*. *Swager*, 903 N.W.2d at 375. Clearly, as the district court stated, Jeremy's shooting of Rosemarie undeniably represents "the one most immediate, efficient, and direct cause of the plaintiff's injuries." *Id.* at 369 (quotation marks omitted). We therefore affirm the district court on this issue.

4. Supplemental Jurisdiction

Among the issues raised in her Rule 59(e) motion for reconsideration, plaintiff argued that the district court should have declined to exercise jurisdiction over her state law wrongful death claim pursuant to 28 U.S.C. § 1367. Section 1367 provides that courts "may" decline to exercise supplemental jurisdiction under certain conditions: the claim involves novel questions of state law; the state claim predominates over the federal claims; the court has dismissed the federal claims; or other exceptional circumstances provide a compelling reason to decline supplemental jurisdiction. 28 U.S.C. § 1267(c)(1)-(4).

The district court addressed plaintiff's argument in its Memorandum Opinion and Order denying the motion for reconsideration:

> This argument . . . does not provide a proper ground for reconsideration. "Arguments raised for the first time in a motion for reconsideration are untimely." *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 692 (6th Cir. 2012). Further, the argument does not reveal a "clear error of law" or "palpable defect" where 28 U.S.C. § 1367(c) permits, but does not require, a court to decline to exercise its supplemental jurisdiction.

(R. 68, Mem. Op. and Order, Page ID 511.) Given that the district court decided this entire matter on the pleadings, plaintiff points out that she raised the issue at the first opportunity in her motion for reconsideration. That said, all of the other factors weigh in favor of the district court's decision to retain jurisdiction.

Accordingly, we hold that the district court did not abuse its considerable discretion in exercising jurisdiction over the state-law claim.

III.

The judgment is affirmed.

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN (NOVEMBER 13, 2020)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAMELA REILLY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSEMARIE REILLY,

Plaintiff,

v.

COUNTY OF OTTAWA, ET AL.,

Defendants.

Case No. 1:18-cv-1149

Before: Hon. Janet T. NEFF,
United States District Judge.

Pending before the Court is Plaintiff's Motion for Reconsideration (ECF No. 64). Defendants Ottawa County, Ottawa County Sheriff's Department (OCSD) Police Officer Eric Tubergen, and OCSD Sergeants Chris Dill and Dennis Luce (collectively "the Ottawa County Defendants") filed a response in opposition (ECF No. 66), as did Grand Valley State University (GVSU) Police Officer Collin Wallace and GVSU Police Captain Brandon DeHaan (collectively "the

GVSU Defendants") (ECF No. 67).[1] For the following reasons, Plaintiff's motion is properly denied.

Plaintiff initiated this § 1983 case in October 2018, alleging the following four claims:

I. "Fourteenth Amendement [sic] Violations under 42 U.S.C. § 1983 as to (All/Individual) Defendants"

II. "Municipal Liability as to Defendant Ottawa County"

III. "Wrongful Death as to Defendants Tubergon [sic], Dill, Luce, Wallace, DeHaan and Kelley"

IV. "Civil Conspiracy as to Defendants Tubergon [sic], Dill, Luce, Wallace, DeHaan and Kelley"

(Am. Compl., ECF No. 8). On September 21, 2020, this Court issued an Opinion and Order granting Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) as to all four claims (ECF No. 62) and closing this case (Judgment, ECF No. 63). Plaintiff now moves for reconsideration pursuant to FED. R. CIV. P. 59(e) regarding her claims in Counts I and III, only.

Motion Standard. Because the Federal Rules of Civil Procedure do not expressly provide for motions for reconsideration, courts customarily treat such as motions to alter or amend judgment under Federal Rule of Civil Procedure 59(e), which is the rule upon which Plaintiff relies. *See, e.g., Huff v. Metro. Life Ins. Co.*, 678 F.2d 119, 122 (6th Cir. 1982) ("The district court properly treated the motion to reconsider as a motion under Rule 59 to alter or amend judgment.").

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[1] Defendant Sean Kelley did not file a response.

"A district court may grant a Rule 59(e) motion only to (1) correct a clear error of law, (2) account for newly discovered evidence, (3) accommodate an intervening change in the controlling law, or (4) otherwise prevent manifest injustice." *Moore v. Coffee Cty., Tenn.*, 402 F. App'x 107, 108 (6th Cir. 2010). "A motion under Rule 59(e) is not an opportunity to re-argue a case." *Michigan Flyer LLC v. Wayne Cty. Airport Auth.*, 860 F.3d 425, 431 (6th Cir. 2017) (citation omitted). Under this Court's local rules, Plaintiff must "not only demonstrate a palpable defect by which the Court and the parties have been misled, but also show that a different disposition of the case must result from a correction thereof." *See* W.D. Mich. L. Civ. R. 7.4(a). Whether to grant or deny a motion for reconsideration falls within the district court's discretion. *See Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 691 (6th Cir. 2012).

Count I. This Court carefully delineated the acts and omissions that Plaintiff alleged in Count I of her Amended Complaint and concluded that the alleged facts did not state a plausible claim against the individual Defendants under a state-created-danger theory of constitutional liability under 42 U.S.C. § 1983 (Op. & Order, ECF No. 62 at PageID.437). Plaintiff expressly indicates that her motion for reconsideration is focused on only two of the delineated factual allegations, to wit: "Defendants' mailing of the arrest warrants and communications with both Jeremy and his father" (ECF No. 64 at PageID.458). As noted in the Opinion and Order, Plaintiff made these allegations in her Amended Complaint against no particular Defendant, alleging as follows:

- "[a] warrant was prepared by Defendant OCSD for Jeremy's arrest on October 28, 2016, arising out of Rosemarie's report of domestic violence," and "[p]ursuant to Defendant OCSD's policies, this warrant was mailed to Jeremy's residence" (Am. Compl. [ECF No. 8] ¶¶ 69-70); and
- "[u]pon information and belief, either Jeremy's father or one of the Defendant police officers in the area also informed Jeremy he had a warrant for his arrest relating to the domestic violence incident but did not effectuate his arrest" (*id.* ¶ 76).

In support of reconsideration, Plaintiff argues that this Court "implicitly engaged in an improper weighing of the facts" and did not give Plaintiff the benefit of all reasonable inferences (ECF No. 64 at PageID.456, 458-459). Plaintiff emphasizes that whether an officer's affirmative conduct "increases" the preexisting danger to a plaintiff is undeniably a fact-intensive inquiry and that the plausibility standard under Rule 12 "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]" (*id.* at PageID.459). Plaintiff argues that like the defendants in the Sixth Circuit's "new decision" in *Lipman v. Budish*, 974 F.3d 726 (6th Cir. 2020), Defendants in this case "may show during discovery that Rosemarie did not face an increased risk from Jeremy Kelly due to these affirmative acts, [b]ut that determination can only be made at the summary judgment stage" (*id.* at Page ID.459-469).

Plaintiff's argument lacks merit.

As a threshold matter, as the Ottawa County Defendants point out, state-created danger claims are not invulnerable to dismissal under Rule 12 (ECF No. 66 at PageID.485, citing, *e.g.*, *Nuchols v. Bserrong*, 141 F. App'x 451, 454 (6th Cir. 2005) (holding that the "complaint fails to allege necessary facts to prevail on [a state-created danger] theory . . . "). *See also Hudson v. Hudson*, 475 F.3d 741, 745 (6th Cir. 2007) (holding, at motion-to-dismiss stage, that the police officers' failure to serve a PPO "fails to satisfy the 'affirmative act' requirement necessary to establish a state-created-danger substantive due process claim").

Further, this Court did not misapply the standard for deciding motions under Rule 12. This Court determined that the facts Plaintiff had alleged, accepted as true and with all reasonable inferences drawn in Plaintiff's favor, did not state a plausible claim. Specifically, with regard to the warrants, the Court held that

> [U]nder the caselaw, the alleged failure by GVSU Officer Wallace and/or the OCSD officers to personally serve the arrest warrants in this case is . . . not an affirmative act that states a plausible *DeShaney* claim. *See, e.g., Jones v. Union Cty.*, 296 F.3d 417, 430-31 (6th Cir. 2002) (failure to timely serve ex parte PPO on ex-husband was not actionable under *DeShaney*, even though "the Sheriff's Department was well aware of the seriousness of the domestic problems involving [p]laintiff and her ex-husband."

(Op. & Order, ECF No. 62 at PageID.436-437). With regard to the alleged communications, the Court held that under binding Sixth Circuit caselaw,

> Defendants' conversations with Jeremy, notifying him of the decedent's report and/or telling him he was not going to be arrested, are also insufficient to state a *DeShaney* claim. *See, e.g., Brooks* [*v. Knapp*], 221 F. App'x [402,] at 406 [6th Cir. 2007] (holding that the defendant-officers did not do anything "affirmative" to "embolden" the ex-husband by interrogating him but failing to arrest him on the night of the murder); *May v. Franklin Cty. Comm'rs*, 437 F.3d 579, 584-86 (6th Cir. 2006) (officers who merely depart from the scene of a domestic violence call without having taken steps to reduce the risk of harm cannot be held liable under the "state-created danger" exception to *DeShaney*).

(*id.* at PageID.437).

The Sixth Circuit's decision in *Lipman* is neither a "new decision" nor an "intervening change in the controlling law." *Lipman* was published on September 4, 2020, before this Court issued its Opinion and Order in this case on September 21, 2020. Indeed, this Court referenced *Lipman* in its Opinion and Order for the most recent iteration by the Sixth Circuit of the elements of a properly pleaded "state-created danger" claim (Op. & Order, ECF No. 62 at PageID.432). Notably, Plaintiff did not request leave to file any supplemental briefing to this Court on the application of *Lipman*.

The Sixth Circuit's decision in *Lipman* does not reveal a "clear error of law" or "palpable defect" in this Court's analysis. In *Lipman*, 974 F.3d at 746, which also arises from tragic facts, the Sixth Circuit

held that the allegations of the complaint before it gave rise to the reasonable inference that "interviewing [the abused child] in front of her alleged abusers and asking about the source of her injuries increased her risk of further abuse." *Lipman* does not alter this Court's conclusion that Plaintiff's factual allegations in this case about "Defendants' mailing of the arrest warrants and communications with both Jeremy and his father" fail to state a cognizable claim. Indeed, as the GVSU Defendants point out (ECF No. 67 at PageID.499), Plaintiff's motion "fails to even attempt to distinguish" the binding Sixth Circuit caselaw upon which this Court relied for its conclusion. In short, Plaintiff's motion does not demonstrate that reconsideration of Count I is warranted.

Count III. Regarding Plaintiff's Count III, this Court determined that Plaintiff had not sufficiently pleaded a wrongful death claim to avoid governmental immunity (Op. & Order, ECF No. 62 at PageID.443). In support of reconsideration, Plaintiff argues that this Court misapplied the causation analysis the Michigan Supreme Court enunciated in *Ray v. Swagger*, 903 N.W.2d 366 (Mich. 2017), regarding MICH. COMP. LAWS § 691.1407(2) (ECF No. 64 at PageID.469-472). This Court explicitly referenced *Ray* in its analysis of Plaintiff's Count III. As Defendants more fully set forth in their responses, Plaintiff's argument merely presents the same issues ruled upon by the Court and therefore does not provide a proper ground for reconsideration.

Alternatively, Plaintiff argues that this Court should have declined to exercise supplemental jurisdiction over her gross negligence claim (ECF No. 64 at PageID.472-474). This argument also does not pro-

vide a proper ground for reconsideration. "Arguments raised for the first time in a motion for reconsideration are untimely." *Evanston Ins. Co.*, 683 F.3d at 692. Further, the argument does not reveal a "clear error of law" or "palpable defect" where 28 U.S.C. § 1367(c) permits, but does not require, a court to decline to exercise its supplemental jurisdiction. *See also Gamel v. Cincinnati*, 625 F.3d 949, 951 (6th Cir. 2010) (stating that § 1367 grants a district court "broad discretion" to decide whether to exercise jurisdiction over state-law claims).

Therefore:

IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration (ECF No. 64) is DENIED.

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

Dated: November 13, 2020

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN (SEPTEMBER 21, 2020)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAMELA REILLY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSEMARIE REILLY,

Plaintiff,

v.

COUNTY OF OTTAWA, ET AL.,

Defendants.

Case No. 1:18-cv-1149

Before: Hon. Janet T. NEFF,
United States District Judge.

Now pending before the Court in this case brought pursuant to 42 U.S.C. § 1983 are Defendants' Motions to Dismiss (ECF Nos. 49, 52 & 55). Having considered the parties' submissions, the Court concludes that oral argument is not necessary to resolve the issues presented. *See* W.D. Mich. LCivR 7.2(d). For the reasons that follow, the Court grants Defendants' motions and closes this case.

I. Background

This case arises from the undeniably tragic shooting death of Rosemarie Reilly (hereinafter "the decedent") on November 6, 2016 by her ex-boyfriend, Jeremy Kelley (hereinafter "Jeremy"), who then also fatally shot himself (Am. Compl. [ECF No. 8] ¶¶ 16, 77-79). On or about October 12, 2016, the decedent had contacted the police department of Grand Valley State University (GVSU), where she was then a student, and reported Jeremy for stalking, domestic violence/abuse and for putting a gun to her head and threatening to kill her (*id.* ¶ 37). Plaintiff, the decedent's mother, alleges that law enforcement thereafter "did nothing" to protect the decedent and, conversely, that the actions they did take, which are delineated in detail *infra*, "either created the risk or increased the risk of danger to Rosemarie Reilly placing her in substantial risk of serious immediate and proximate harm which was the cause of her death" (*id.* ¶¶ 81 & 90).

On October 5, 2018, Plaintiff initiated this case, filing an Amended Complaint on November 2, 2018 against the following seven defendants: Ottawa County, Ottawa County Sheriff's Department (OCSD) Police Officer Eric Tubergen, and OCSD Sergeants Chris Dill and Dennis Luce (collectively "the Ottawa County Defendants"); GVSU Police Officer Collin Wallace and GVSU Police Captain Brandon DeHaan (collectively "the GVSU Defendants"); and Sean Kelley, Jeremy's father and an officer for the Bloomfield Township Police Department (ECF No. 8). Plaintiff alleges the following four claims:

I. "Fourteenth Amendement [sic] Violations under 42 U.S.C. § 1983 as to (All/Individual) Defendants"

II. "Municipal Liability as to Defendant Ottawa County"

III. "Wrongful Death as to Defendants Tubergon [sic], Dill, Luce, Wallace, DeHaan and Kelley"

IV. "Civil Conspiracy as to Defendants Tubergon [sic], Dill, Luce, Wallace, DeHaan and Kelley"

(*id.*). The Ottawa County Defendants answered Plaintiff's Amended Complaint (ECF No. 10). Defendant Kelley answered Plaintiff's Amended Complaint (ECF No. 33). The Court extended the time for the GVSU Defendants to answer the Amended Complaint until further Order (ECF No. 39).

Following a pre-motion conference in July 2019, and an attempt by the parties to settle the case, the Court issued an Order setting forth a briefing schedule on Defendants' proposed dispositive motions (ECF No. 39). In January 2020, Defendants filed their motions to dismiss (ECF Nos. 49, 52 & 55), to which Plaintiff filed a collective response in opposition (ECF No. 59). Defendants filed their respective replies to Plaintiff's response (ECF Nos. 58, 60 & 61).

II. Analysis

A. Motion Standard

Defendants seek dismissal under Federal Rule of Civil Procedure 12(b)(6), which authorizes a court to dismiss a complaint if it "fail[s] to state a claim upon which relief can be granted[.]" Fed. R. Civ. P. 12(b)(6). Specifically, a complaint must present "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 570 (2007). The court views the complaint in the

light most favorable to the plaintiff, accepting as true all well-pled factual allegations and drawing all reasonable inferences in favor of the plaintiff. *Gavitt v. Born*, 835 F.3d 623, 639-40 (6th Cir. 2016). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). And "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

B. Discussion

1. Count I—"Fourteenth Amendement [sic] Violations under 42 U.S.C. § 1983 as to (All/Individual) Defendants"

In Count I, Plaintiff alleges that Defendants, in their individual capacities, deprived the decedent of her "clearly established right, under the Fourteenth Amendment to the United States Constitution, to be free from danger created by the state" (Am. Compl. ¶¶ 93-94). Plaintiff alleges that Defendants' acts and/or omissions constituted deliberate indifference to this right, and that their deliberate indifference was "a proximate cause of [the decedent's] death and conscious suffering" (*id.* ¶¶ 95 & 98).

In support of dismissal of Count I, GVSU Defendants DeHaan and Wallace argue that any alleged failure on their part to protect the decedent from Jeremy did not violate the decedent's substantive due process rights because, under *DeShaney v. Winnebago Cty. Dep't of Social Servs.*, 489 U.S. 189, 197 (1989), "a State's failure to protect an individual against private violence simply does not constitute a

violation of the Due Process Clause" (ECF No. 50 at PageID.300).

The Ottawa County Defendants argue that processing arrest warrants in the face of a criminal complaint is "what law enforcement officers typically do and should do anytime a person like Rosemarie complains to them about an assault and battery" and that Plaintiff has failed to allege any facts showing that they acted with deliberate indifference in handling the decedent's case (ECF No. 53 at PageID.325-327). They also point out that Jeremy's possessive, stalking, and violent tendencies pre-dated their involvement in the case and had already prompted both Plaintiff and the decedent to seek intervention of the law enforcement and court system through the PPO, facts that do not support Plaintiff's claim that Defendants' actions "created" or "increased" the risk of harm to the decedent (*id.* at PageID.325-326).

Defendant Kelley asserts that Plaintiff's claim "does not apply" to him because he was acting as Jeremy's father, not as a state actor acting under "color of state law" as required for a § 1983 claim (ECF No. 56 at PageID.343-344). Defendant Kelley argues that even if he was a state actor, Plaintiff alleges only an unsubstantiated and inadmissible phone call with OCSD police officers, which is not an affirmative act that could be seen as putting the decedent in any special danger or distinguished risk (*id.* at PageID.345-346).

Defendants collectively argue that they are also entitled to qualified immunity on Count I where (a) they did not plausibly violate any constitutional right of the decedent; and (b) even if the decedent's constitutional rights were somehow violated, there are no

cases finding a constitutional right to be free from an increased risk of harm under these exact (or even vaguely similar) circumstances (ECF No. 50 at PageID.306-307; ECF No. 53 at PageID.327; ECF No. 56 at PageID.345).

In response, Plaintiff argues that the affirmative acts of GVSU Defendants DeHaan and Wallace, as specifically pled, constitute a "series of impermissible communications and acts" that emboldened Jeremy, led to Jeremy's belief that he was "outside of the reach of the law," and increased the decedent's risk of harm (ECF No. 59 at PageID.377-391). Plaintiff argues that the allegations are sufficient to plead a *DeShaney* claim against them (*id.* at PageID.391). Plaintiff argues that the alleged conduct by the OCSD officers, including mailing Jeremy the arrest warrant and assuring Jeremy and his father that Jeremy would not be arrested, also meets the *DeShaney* affirmative-act standard (*id.* at PageID.391-394). As to Defendant Kelley, Plaintiff posits that "[g]iven the alleged facts and the degree of indifference the individual Defendants took to this matter, it seems probable that Sean Kelley acted in his official capacity as an officer, and not a parent" (*id.* at PageID.402-403). Last, Plaintiff argues that Defendants' attempt to "hide behind qualified immunity" is disingenuous because "a reasonable officer would have known that acting in a manner that emboldened an abuser and permitted an abuser to act with impunity in the face of escalating, criminal conduct unconstitutionally increased the risk to the abused" (*id.* at PageID.394-396).

Defendants' arguments have merit.

Plaintiff's Fourteenth Amendment claim in Count I is brought under 42 U.S.C. § 1983. Section 1983

does not confer substantive rights but merely provides a means to vindicate rights conferred by the Constitution or laws of the United States. *Aldini v. Johnson*, 609 F.3d 858, 864 (6th Cir. 2010). Specifically, § 1983 provides a cause of action against a government official who performs discretionary duties in a manner that deprives an individual of a right secured by the Constitution or laws of the United States, if the right was clearly established at the time of the deprivation. *Smith v. Erie Cty. Sheriff's Dep't*, 603 F. App'x 414, 418 (6th Cir. 2015) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To state a claim under 42 U.S.C. § 1983, "'a plaintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under the color of state law.'" *Scott v. Kent Cty.*, 679 F. App'x 435, 438 (6th Cir. 2017) (citation omitted).

"Government officials are immune from civil liability under 42 U.S.C. § 1983 when performing discretionary duties, provided 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Simmonds v. Genesee Cty.*, 682 F.3d 438, 443 (6th Cir. 2012) (quoting *Harlow*, 457 U.S. at 818). The Sixth Circuit recently reiterated that "despite the general preference to save qualified immunity for summary judgment, sometimes it's best resolved in a motion to dismiss," which "happens when the complaint establishes the defense." *Siefert v. Hamilton Cty.*, 951 F.3d 753, 762 (6th Cir. 2020). At the pleading stage, the ultimate test is whether, reading the Amended Complaint in the light most favorable to Plaintiff, it is plausible that the individual Defendants'

acts or omissions violated her clearly established constitutional rights. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Osberry v. Slusher*, 750 F. App'x 385, 392 (6th Cir. 2018); *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016).

This is a "two-tiered inquiry" that requires the court to (1) "determine if the facts alleged make out a violation of a constitutional right" and (2) "ask if the right at issue was 'clearly established' when the event occurred such that a reasonable officer would have known that his conduct violated it." *Osberry, supra* (quoting *Martin v. City of Broadview Hts.*, 712 F.3d 951, 957 (6th Cir. 2013)). The court can address these questions in either order but must answer both questions in the affirmative for a plaintiff's complaint to survive. *Id.*

Plaintiff alleges the deprivation of the decedent's rights under the Due Process Clause of the Fourteenth Amendment, which protects persons against State deprivations "of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. The United States Supreme Court has instructed that even in the face of "undeniably tragic" and "calamitous" circumstances, "[a]s a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 191. But the Supreme Court acknowledged that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals," "leaving the door open for another set of 'limited circumstances' that would give rise to a state's affirmative duty to protect when it noted that 'while the State may have been

aware of the dangers that [the victim] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 464 (6th Cir. 2006) (quoting *DeShaney*, 489 U.S. at 198, 201).

The Sixth Circuit, like other circuits, has since recognized a "state-created-danger theory of constitutional liability under § 1983." *McQueen, supra.* The parties agree, and the Sixth Circuit recently reiterated, that the elements of a properly pleaded "state-created danger" are the following:

> 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff.

Lipman v. Budish, No. 19-3914, 2020 WL 5269826, at *13 (6th Cir. Sept. 4, 2020) (quoting *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003)).

"Plaintiffs who seek to hold state officials constitutionally liable on a 'failure-to-protect' claim face a high burden under *DeShaney*." *Engler v. Arnold*, 862 F.3d 571, 576 (6th Cir. 2017). On numerous occasions, the Sixth Circuit has rejected claims because the challenged conduct either "was not an affirmative act at all or did not create or increase the risk of private violence to the plaintiff." *McQueen*, 433 F.3d at 465

(citing cases). *See also Jones v. Reynolds*, 438 F.3d 685, 688 (6th Cir. 2006) (observing that "when a claimant argues that government officials failed to prevent private individuals from causing another injury, *DeShaney* . . . and its progeny rarely permit the claim to go forward").

Important to the analysis is the rule that "[a]n assertion of a failure to act does not support a state-created-danger theory[.]" *Engler*, 862 F.3d at 576. Instead, a plaintiff "must point to conduct which either created or increased the risk of harm, and show not only that [s]he could have been saved, but also that [s]he was safer before the state action than [s]he was after it." *Id.* at 575 (citation and quotation marks omitted) (emphases in original). *See also Koulta v. Merciez*, 477 F.3d 442, 445-46 (6th Cir. 2007) ("Rather than focusing on the often metaphysical question of whether officer behavior amounts to affirmative conduct or [inaction], we have focused on whether the victim was safer before the state action than [she] was after it.").

Here, Plaintiff alleges that before the decedent contacted any Defendants or any Defendants took any actions, Jeremy:

- attempted to commit suicide on October 5, 2016 (Am. Compl. ¶ 20);
- stalked and harassed the decedent so persistently that she moved out of their shared residence (*id.* ¶¶ 19, 23, 25);
- physically assaulted the decedent to prevent her from leaving: "punch[ing] her in the face, arms, and legs several times, causing

her broken nose among other injuries" (*id.* ¶¶ 28-30);

- called the decedent approximately 43 times from October 8 through October 11, 2016 (*id.* ¶ 31);
- held a gun to his own head and threatened to kill himself after failing to locate the decedent on October 11, 2016 (*id.* ¶ 33);
- jumped in front of the decedent's car on October 12, 2016, "pounding on the window and head-butting her vehicle" (*id.* ¶ 36); and
- put a gun to the decedent's head on October 12, 2016 and "threaten[ed] to kill her" (*id.* ¶ 37).

As Defendants point out (ECF No. 61 at PageID.420), "Jeremy's suicidal tendencies and homicidal tendencies toward Rosemarie predated Defendants' involvement in this case."

On October 12, 2016, the decedent contacted GVSU's police department, and the affirmative acts that Plaintiff alleges the individual Defendants thereafter committed are as follows. Against GVSU Officer Wallace, Plaintiff alleges that Wallace

1. "completed a 'no trespassing' form for Jeremy along with creating an incident report based on stalking arising from the circumstances Rosemarie told him about" and "affirmatively suggested Rosemarie file a PPO against Jeremy" (Am. Compl. ¶¶ 37, 40);
2. contacted the OCSD, which dispatched Sergeant Dill to the GVSU campus to give

the decedent the PPO paperwork (*id.* ¶ 38); and

3. mailed Jeremy a warrant for his arrest on or around November 2, 2016, a warrant arising out of the decedent's complaint of his stalking (*id.* ¶ 71).

Against OCSD Sergeant Dill, Plaintiff alleges that Dill

1. gave the decedent paperwork for a PPO and "encouraged" her to file it (*id.* ¶¶ 38-39);

2. took the decedent's report on October 13, 2016 of being threatened with a gun (*id.* ¶ 46); and

3. called Jeremy on October 13, 2016 about the decedent's complaint of domestic violence and informed Jeremy that he was "not going to take Jeremy to jail" (*id.* ¶ 47.)

Against OCSD Officer Tubergen, Plaintiff alleges that Tubergen

1. visited Jeremy on October 13, 2016 and told him to "leave Rosemarie alone" (*id.* ¶¶ 41-42);

2. called Plaintiff after visiting Jeremy and told her that "there was nothing that could be done to prevent Jeremy from calling Rosemarie, that he had seen Jeremy's guns and that Jeremy was legally allowed to own those guns, and that he was 'well aware' that Jeremy's father, Sean Kelley, was a police officer" (*id.* ¶ 43); and

3. told Plaintiff that the decedent needed to file a report about Jeremy holding a gun to the decedent's head (*id.* ¶ 45).

Against OCSD Sergeant Luce, Plaintiff alleges that Luce

1. took Plaintiff's phone call expressing concern regarding retrieving the decedent's belongings from Jeremy's trailer because of the presence of firearms with which Jeremy had threatened the decedent (*id.* ¶ 54); and

2. told Jeremy's father that "Jeremy was allowed to have guns and that there was no cause to remove them" (*id.* ¶ 55).

Against GVSU Police Captain DeHaan, Plaintiff alleges that DeHaan

1. reviewed the October 13, 2016 reports of GVSU Officer Wallace and OCSD Sergeant Dill (*id.* ¶ 49);

2. took Plaintiff's phone call expressing concern about Jeremy stalking the decedent and Jeremy's guns and that Jeremy's father may "offer[] Jeremy bad advice regarding the situation" (*id.* ¶ 50); and

3. spoke to Jeremy on October 13, 2016 and told Jeremy he "was banned from GVSU property, was not allowed [] to enter any GVSU property, and not to contact any of the Reilly family members by phone, e-mail or any other electronic means" (*id.* ¶¶ 52-53).

Against Defendant Kelley, Plaintiff alleges only that "[u]pon information and belief, Jeremy's father,

Defendant Kelley, had spoken with officer(s) from Defendant OCSD prior to this encounter and on behalf of his son" (*id.* ¶ 57).

Last, Plaintiff also generally alleges against no particular Defendant that

- "[a] warrant was prepared by Defendant OCSD for Jeremy's arrest on October 28, 2016, arising out of Rosemarie's report of domestic violence," and "[p]ursuant to Defendant OCSD's policies, this warrant was mailed to Jeremy's residence" (*id.* ¶¶ 69-70); and
- "[u]pon information and belief, either Jeremy's father or one of the Defendant police officers in the area also informed Jeremy he had a warrant for his arrest relating to the domestic violence incident but did not effectuate his arrest" (*id.* ¶ 76).

As a threshold matter, many of the actions taken by Defendants—creating incident reports, giving the decedent paperwork, telling the decedent and Plaintiff to file reports, taking Plaintiff's phone calls, reviewing reports—are not acts that increased the preexisting danger to the decedent but are acts that arguably made her safer. And the remainder of the acts alleged by Plaintiff are insufficient to state a *DeShaney* claim.

Again, a failure to act is not an affirmative act under the state-created-danger theory. *See Engler*, 862 F.3d at 576. "This is so, even where officers can be seen not only to have ignored or disregarded the risk of injury, but to have condoned it." *Brooks v. Knapp*, 221 F. App'x 402, 407 (2007). *See also Stiles*

ex rel. D.S. v. Grainger Cty., 819 F.3d 834, 854-55 (6th Cir. 2016) (citing cases for the proposition that merely "ignoring a dangerous situation is usually not an affirmative act and, furthermore, usually cannot increase a preexisting danger"). And no "affirmative duty to protect arises . . . from the State's . . . expressions of intent to help" an individual at risk. *DeShaney*, 489 U.S. at 200. Accordingly, any alleged failure by Defendants to take Jeremy into custody, take away his firearm or otherwise fail to "follow up" is not actionable under § 1983. *See, e.g., Culp v. Rutledge*, 343 F. App'x 128, 135-36 (6th Cir. 2009) ("any failure by Sergeant Cooper to follow up on Jamika's domestic violence claim constitutes inaction, which does not qualify as an affirmative act under a state-created danger theory") (emphasis in original); *Brooks,* 221 F. App'x at 406 ("Officer Drumb's failure to do anything other than to detain Mr. Hernandez briefly on the night before he killed Mrs. Hernandez is not actionable").

Similarly, under the caselaw, the alleged failure by GVSU Officer Wallace and/or the OCSD officers to personally serve the arrest warrants in this case is also not an affirmative act that states a plausible *DeShaney* claim. *See, e.g., Jones v. Union Cty.*, 296 F.3d 417, 430-31 (6th Cir. 2002) (failure to timely serve ex parte PPO on ex-husband was not actionable under *DeShaney*, even though "the Sheriff's Department was well aware of the seriousness of the domestic problems involving [p]laintiff and her ex-husband").

Last, Defendants' conversations with Jeremy, notifying him of the decedent's report and/or telling him he was not going to be arrested, are also insufficient

to state a *DeShaney* claim. *See, e.g., Brooks*, 221 F. App'x at 406 (holding that the defendant-officers did not do anything "affirmative" to "embolden" the ex-husband by interrogating him but failing to arrest him on the night of the murder); *May v. Franklin Cty. Comm'rs*, 437 F.3d 579, 584-86 (6th Cir. 2006) (officers who merely depart from the scene of a domestic violence call without having taken steps to reduce the risk of harm cannot be held liable under the "state-created danger" exception to *DeShaney*).

In sum, Plaintiff's allegations in Count I fail to state a claim against any of the individual Defendants because (1) their alleged failures to act do not support a state-created-danger theory, and (2) the affirmative acts Plaintiff delineates did not plausibly increase the preexisting danger to the decedent. Count I is therefore properly dismissed for failure to state a claim. Because the alleged facts do not make out a violation of a constitutional right, Defendants are also entitled to qualified immunity. *See Pearson, supra*; *Osberry, supra.*

The Court briefly states that even if Count I was not properly dismissed against Defendant Kelley for failure to state a claim, Plaintiff has not demonstrated that this § 1983 claim is properly brought against him. "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmonson Oil. Co.*, 457 U.S. 922, 936 (1982). "It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.*

Plaintiff does not allege in her Complaint why Defendant Kelley's challenged conduct may be fairly

attributable to the State for purposes of her § 1983 claim against him. *See generally Vistein v. Am. Registry of Radiologic Technologists*, 342 F. App'x 113, 127 (6th Cir. 2009) (describing the four tests the Supreme Court has established for determining whether challenged conduct may be fairly attributable to the State for purposes of a § 1983 claim). And in briefing, she proffers only the general proposition that "a public official acts under color of state law when she has exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law" (ECF No. 59 at PageID.402, quoting *West v Atkins*, 487 U.S. 42, 49 (1988)). As Defendant Kelley points out (ECF No. 58 at PageID.354), *West* involved a private physician who was under contract with the State to provide medical services to inmates at a state-prison hospital and is not relevant to the facts of the case at bar. Plaintiff's submission that Defendant Kelley was acting "under color of state law" for purposes of her § 1983 claim against him in Count I is not convincing, and the failure to satisfy this element provides an additional basis for dismissal of the claim against this Defendant.

2. Count II—"Municipal Liability as to Defendant Ottawa County"

In Count II, which is also brought pursuant to 42 U.S.C. § 1983, Plaintiff alleges that Defendant Ottawa County, "through their policy making officials:"

a. Failed to establish, implement, and/or execute adequate policies, procedures, rules and regulations to protect individuals, such as Rosemarie Reilly, from individuals with

violent tendencies or who had PPOs against them;

b. Failed to establish, implement, and/or execute adequate policies, procedures, rules and regulations to protect individuals, such as Rosemarie Reilly, from individuals against whom arrest warrants had been issued.

c. Defendant's policy, procedures, regulations, and customs, and/or its failure to enact the same, caused and was the driving force behind the violations of Plaintiff's constitutional rights as alleged in this Complaint.

d. Failing to properly train its employees, including the above-named Defendant.

e. Failed to establish, implement, and/or execute adequate policies, procedures, rules and regulations that ensured officers from different police departments—Defendant Kelley—could improperly influence investigations and/or police conduct.

(Am. Compl. ¶ 104). Plaintiff alleges that Defendant Ottawa County's customs, policies and/or practices were "a proximate cause of the death and conscious suffering of Plaintiff's decedent" (*id.* ¶ 107).

In support of dismissal of Count II, the Ottawa County Defendants argue that without an underlying constitutional violation against the individual officers, there can be no municipal liability for the County (ECF No. 53 at PageID.328). The Ottawa County Defendants also argue that Plaintiff has failed to allege facts identifying a municipal policy or custom that was the moving force behind those injuries (*id.*).

Last, they point out that Plaintiff's Amended Complaint is devoid of any allegations of any conduct by any party to the case outside of the instant case, let alone any allegation that PPOs and arrest warrants for battery issued in the past have created an unconstitutional pattern of causing more acts of domestic violence in Ottawa County, such that the Ottawa County Sheriff should take particular, specific training actions (*id.* at PageID.331).

In response, Plaintiff argues that "the de facto policy of allowing Sean Kelley's intervention, the actual policy of mailing arrest warrants and not taking action and the de facto policy of providing assurances to perpetrators they will not be arrested despite committing crimes undeniably played a role here" (ECF No. 59 at PageID.400-401). Plaintiff also argues that "there is a reasonable basis that Defendants were inadequately trained to the extent they did not know how to properly handle OCSD's arrest warrant procedures and/or they were not trained to be persuaded by outside police influences like Sean Kelley" (*id.* at PageID.401). However, Plaintiff also "cedes that the availability of her municipal liability claim under *Monell* . . . first hinges on a finding of unconstitutionality from the named individual defendants" (*id.* at PageID.400).

The Ottawa County Defendants' arguments have merit.

Counties and other local governments are not vicariously liable in § 1983 actions "merely because they employ someone who has committed a constitutional violation." *Arrington-Bey v. City of Bedford Heights, Ohio*, 858 F.3d 988, 994 (6th Cir. 2017) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658,

690-91 (1978)). Rather, municipalities "must pay for violations only if the injury is caused by a municipal custom or policy, or if the city's failure to train employees amounts to deliberate indifference to constitutional rights." *Id.* "[W]here there has been no showing of individual constitutional violations on the part of the officers involved, there can be no municipal liability." *Baker v. City of Trenton*, 936 F.3d 523, 535 (6th Cir. 2019). *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of unconstitutionally excessive force is quite beside the point."); *see also Robertson v. Lucas*, 753 F.3d 606, 622 (6th Cir. 2014) ("There can be no liability under *Monell* without an underlying constitutional violation.").

Given this Court's holding that Count I is properly dismissed, Count II is likewise properly dismissed. Moreover, Plaintiff fails to allege more than a single instance of a substantive due process violation like that alleged in this case. "A failure-to-train claim . . . requires a showing of prior instances of unconstitutional conduct demonstrating that the municipality had ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013). In short, Plaintiff fails to state a plausible *Monell* claim against Ottawa County.

3. Count III—"Wrongful Death as to Defendants Tubergon [sic], Dill, Luce, Wallace, DeHaan and Kelley"

In Count III, Plaintiff alleges that the acts and /or omissions of Defendants Tubergen, Dill, Luce, Wallace, DeHaan and Kelley constitute gross negligence under state law and that their gross negligence was "a proximate cause" of the decedent's injuries, including her wrongful death (Am. Compl. ¶¶ 112 & 114).

In support of dismissal of Count III, Defendants collectively argue that Plaintiff has not sufficiently pleaded a wrongful death claim to avoid governmental immunity where she expressly alleges only that Defendants' alleged conduct was "a" proximate cause of the decedent's injuries and "the one most immediate, efficient, and direct cause" of the decedent's injuries was clearly Jeremy's conduct (ECF No. 50 at PageID.309-311; ECF No. 53 at PageID.331-332; ECF No. 56 at PageID.346-347).

In response, Plaintiff argues that the pleadings alone show that Defendants' "individualized, collective conduct" increased the decedent's risk of harm and that "merely because Jeremy killed Rosemarie does not firmly establish Defendants' conduct was not the 'proximate cause'" (ECF No. 59 at PageID.397). Plaintiff argues that Jeremy's conduct in murdering the decedent was "undeniably foreseeable in light of Defendants' actions in emboldening and failing to arrest Jeremy for escalating criminal behavior involving Rosemarie" (*id.* at PageID.398-399).

Defendants' arguments have merit.

Michigan's wrongful death statute provides that

> [w]henever the death of a person . . . shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages. . . .

Mich. Comp. Laws § 600.2922(1).

Under Michigan's governmental immunity statute, however, an officer is immune from tort liability when the following three requirements are met:

> (1) the officer "is acting or reasonably believes he or she is acting within the scope of his or her authority," (2) "[t]he governmental agency is engaged in the exercise or discharge of a governmental function," and (3) the officer's "conduct does not amount to gross negligence that is the proximate cause of the injury or damage."

Mich. Comp. Laws § 691.1407(2). The Michigan Supreme Court long ago defined "the proximate cause" as "the immediate efficient, direct cause preceding the injury." *Robinson v. City of Detroit*, 613 N.W.2d 307, 319 (Mich. 2000) (quoting *Stoll v. Laubengayer*, 140 N.W. 532, 534 (Mich. 1913)). The Michigan Supreme Court has instructed that "a proper proximate cause analysis must assess foreseeability and the legal responsibility of the relevant actors to determine whether the conduct of a government actor, or some other person, was 'the proximate cause,' that is, as our caselaw has described it, 'the one most imme-

diate, efficient, and direct cause' of the plaintiff's injuries." *Ray v. Swager*, 903 N.W.2d 366, 369 (Mich. 2017). As the Sixth Circuit has observed, "proximate cause is a high bar" under the statute. *Walker v. Detroit Pub. Sch. Dist.*, 535 F. App'x 461, 467 (6th Cir. 2013).

Plaintiff's pleading does not meet this high bar. As Defendants point out, Plaintiff expressly alleges in her Amended Complaint that the alleged conduct of Defendants was "a proximate cause," not the proximate cause of the decedent's injuries. And, viewing the Amended Complaint in the light most favorable to Plaintiff, accepting as true all well-pled factual allegations and drawing all reasonable inferences in favor of Plaintiff, "the one most immediate, efficient, and direct cause" of the decedent's injuries was clearly Jeremy's conduct, not any alleged actions or inactions by Defendants. *See* Am. Compl. ¶ 16 ("Rosemarie was shot and killed at approximately 3:00 a.m. on November 6, 2016 by her ex-boyfriend, Jeremy Kelley. . . . "). Plaintiff has therefore not pleaded a plausible wrongful death claim in avoidance of governmental immunity.

4. Count IV—"Civil Conspiracy as to Defendants Tubergon [sic], Dill, Luce, Wallace, DeHaan and Kelley"

Last, in Count IV, Plaintiff alleges that, "[u]pon information and belief, Defendants [Tubergen, Dill, Luce, Wallace, and DeHaan] violated Plaintiff's decedent's civil rights pursuant to an agreement with or in concert with Defendant Sean Kelley" (Am. Compl. ¶ 118). Plaintiff identifies the following three alleged civil rights violations:

a. Allowing Jeremy Kelley to remain out of police custody despite numerous violations of a PPO and despite Defendants' knowledge that Jeremy Kelley possessed firearms;

b. Waiting to arrest Jeremy Kelley pursuant to an arrest warrant for domestic violence and mailing said warrant to Jeremy Kelley's residence; [and]

c. Speaking with Jeremy Kelley's father, Defendant Kelley, and listening to his efforts regarding leniency for his son;

(Am. Compl. ¶ 117).

In support of dismissal of Count IV, Defendants collectively argue that Plaintiff's civil conspiracy claim fails because (1) for the reasons stated *supra*, she cannot establish any underlying deprivation of a constitutional right; and (2) her conclusive and speculative allegations only hint at the possibility of a conspiracy (ECF No. 50 at PageID.312-314; ECF No. 53 at PageID.331-332; ECF No. 56 at PageID.347-348).[1] The GVSU Defendants also emphasize that Plaintiff fails to identify any single plan to which Defendants were all allegedly privy and that there is no allegation whatsoever as to what "conspiratorial objective" Defendants supposedly sought to achieve (ECF No. 50 at PageID.313).

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[1] Defendant Kelley also reiterates his argument that he cannot be liable under § 1983 as a private actor (ECF No. 56 at PageID.348); however, this argument is misplaced in this context. *See Cooper v. Parrish*, 203 F.3d 937, 952 n. 2 (6th Cir. 2000) ("If a private party has conspired with state officials to violate constitutional rights, then that party qualifies as a state actor and may be held liable pursuant to § 1983 . . . ")

In response, Plaintiff argues that Defendants' "'plan' is clear based on the well-pled facts," to wit: "to ensure Jeremy Kelley remained free from arrest" (ECF No. 59 at PageID.405-406).

Defendants' arguments have merit.

Although it is unclear from Plaintiff's Amended Complaint or briefing whether Plaintiff's civil conspiracy claim is brought under § 1983 or Michigan law, it is clear that the claim fails under both federal and state law. The elements of a civil conspiracy under § 1983 are that "(1) a single plan existed, (2) the conspirators shared a conspiratorial objective to deprive the plaintiffs of their constitutional rights, and (3) an overt act was committed." *Womack v. Conley*, 595 F. App'x 489, 494 (6th Cir. 2014) (citation omitted). Under Michigan law, a civil conspiracy is "a combination of two or more persons, [who] by some concerted action, [agree] to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Fenestra Inc. v. Gulf American Land Corp.*, 141 N.W.2d 36, 48 (Mich. 1966); *Admiral Ins. Co. v. Columbia Cas. Ins. Co.*, 486 N.W.2d 351, 358 (Mich. Ct. App. 1992).

"Section 1983 does not . . . punish conspiracy; an actual denial of a civil right is necessary before a cause of action arises." *Abdullah v. Harrington*, 37 F.3d 1498 (6th Cir. 1994) (citation omitted). Similarly, a civil conspiracy claim under Michigan law "cannot 'exist in the air.'" *Rondigo, L.L.C. v. Twp. of Richmond, Mich.*, 522 F. App'x 283, 287 (6th Cir. 2013) (quoting *Early Det. Ctr., P.C. v. New York Life Ins. Co.*, 403 N.W.2d 830, 836 (Mich. Ct. App. 1986)). *See also Fenestra*, 141 N.W.2d at 49 ("The conspiracy standing

alone without the commission of acts causing damage would not be actionable.").

Here, as Defendants point out, Plaintiff's claim that Defendants agreed to violate the decedent's delineated civil rights fails at the outset where Plaintiff has not stated a plausible civil rights violation under federal law. For the reasons previously stated, "[a]llowing Jeremy Kelley to remain out of police custody," "[w]aiting to arrest Jeremy Kelley," and "[s]peaking with Jeremy Kelley's father, Defendant Kelley, and listening to his efforts regarding leniency for his son" do not state a substantive due process violation. And Plaintiff fails to identify, let alone demonstrate, the predicate tort upon which any state-law conspiracy claim would rely. *See, e.g., Dauenhauer v. Bank of New York Mellon*, 562 F. App'x 473, 483 (6th Cir. 2014) (affirming dismissal of state-law civil conspiracy claim where there was no underlying tort claim).

Additionally, Plaintiff's claim fails because she provides only "naked assertion[s] devoid of further factual enhancement," which are insufficient to survive the motion-to-dismiss stage. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556-59. Plaintiff fails to state any "plausible, nonconclusory facts to demonstrate that [the defendants] joined [the] conspiracy, shared in the conspiratorial objective, and/or committed specific acts in furtherance of the conspiracy." *See Boxill v. O'Grady*, 935 F.3d 510, 519 (6th Cir. 2019). Plaintiff merely states that Defendants were in agreement or "in concert" to violate the decedent's civil rights. Legal conclusions that are "masquerading as factual allegations" do not suffice. *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d 556, 564 (6th Cir. 2011) (citation omitted) (affirming dismissal of conspiracy claim

where the amended complaint contained allegations about the defendants "conferring with one another at different points" but did not contain "specific allegations of a plan or agreement"); *see also Bickerstaff v. Lucarelli*, 830 F.3d 388, 401 (6th Cir. 2016) (affirming dismissal of civil conspiracy claim where the plaintiff failed to allege any facts indicating that the defendants were in a common plan). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, supra.*

In sum, Plaintiff's conspiracy claim is properly dismissed.

III. Conclusion

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendants' Motions to Dismiss (ECF Nos. 49, 52 & 55) are GRANTED, and Plaintiff's Amended Complaint is DISMISSED.

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

Dated: September 21, 2020

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN (SEPTEMBER 21, 2020)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAMELA REILLY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSEMARIE REILLY,

Plaintiff,

v.

COUNTY OF OTTAWA, ET AL.,

Defendants.

Case No. 1:18-cv-1149

Before: Hon. Janet T. NEFF,
United States District Judge.

In accordance with the Opinion and Order entered this date:

IT IS HEREBY ORDERED that Plaintiff's Amended Complaint is DISMISSED for failure to state a claim.

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

Dated: September 21, 2020

FIRST AMENDED COMPLAINT AND JURY DEMAND (NOVEMBER 2, 2018)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAMELA REILLY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSEMARIE REILLY,

Plaintiff,

v.

OTTAWA COUNTY, A MUNICIPAL CORPORATION; OFFICER ERIC TUBERGEN, IN HIS INDIVIDUAL CAPACITY; SERGEANT CHRIS DILL, IN HIS INDIVIDUAL CAPACITY; POLICE OFFICER COLLIN WALLACE, IN HIS INDIVIDUAL CAPACITY; SERGEANT DENNIS LUCE, IN HIS INDIVIDUAL CAPACITY; CAPTAIN BRANDON DEHAAN, IN HIS INDIVIDUAL CAPACITY; and SEAN KELLEY, IN HIS INDIVIDUAL CAPACITY,

Defendants.

Case No. 1:18-cv-1149

Before: Hon. Janet T. NEFF, United States District Judge, Mag. Ellen S. CARMODY, U.S. Magistrate Judge.

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NOW COMES Plaintiff, PAMELA REILLY, as Personal Representative for the Estate of ROSEMARIE REILLY, by and through her attorneys, RASOR LAW FIRM, PLLC, and for her First Amended Complaint against the above-named Defendants, jointly and severally, states as follows:

JURISDICTION AND VENUE

1. This cause of action is brought pursuant to 42 U.S.C. § 1983, as well as the Fourteenth Amendments to the United States Constitution, and pendant claims arising under the laws of the State of Michigan.

2. This Court has jurisdiction over the claims arising under federal law pursuant to 28 U.S.C.

§ 1331 and supplemental jurisdiction over the claims arising under state law pursuant to 28 U.S.C. § 1367.

3. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391(b), as this cause of action arose within the Western District of Michigan.

PARTIES

4. Plaintiff, Pamela Reilly, is, and was at all times relevant hereto, a citizen of the United States and a resident of the City of New Baltimore, County of Macomb, State of Michigan.

5. Plaintiff is the mother and duly appointed Personal Representative of Rosemarie Reilly, deceased, and brings suit in her representative capacity as the Personal Representative of the estate.

6. Rosemarie Reilly was at all times relevant hereto a citizen of the United States.

7. Defendant Ottawa County was at all times relevant hereto, a body politic and Municipal corporation organized under the laws of the State of Michigan and is responsible for the operation of the Ottawa County Sheriff's Department (herein "OCSD").

8. At all times material and relevant hereto, Defendant Eric Tubergen was an officer of the Ottawa County Sheriff's Department and was acting under the color of state law and in the course and scope of his employment. He is sued in his in his individual capacity.

9. At all times material and relevant hereto, Defendant Chris Dill was a Sergeant for the Ottawa County Sherriff's Department and was acting under

the color of state law and in the course and scope of his employment. He is sued in his individual capacity.

10. At all times material and relevant hereto, Defendant Collin Wallace was a police officer for the Grand Valley State Police Department and was acting under the color of state law and in the course and scope of his employment. He is sued in his individual capacity.

11. At all times material and relevant hereto, Defendant Brandon DeHaan was a Captain for the Grand Valley State Police Department and was acting under the color of state law and in the course and scope of his employment. He is sued in his individual capacity.

12. At all times material and relevant hereto, Defendant Dennis Luce was a Sergeant for the Ottawa County Sheriff's Department and was acting under the color of state law and in the course and scope of his employment. He is sued in his individual capacity

13. At all times material and relevant hereto, Defendant Sean Kelley was an officer for the Bloomfield Township Police Department and the father of Jeremy Kelley. He is sued in his individual capacity.

COMMON FACTUAL ALLEGATIONS

14. Plaintiff reasserts and re-alleges each and every allegation contained in paragraphs 1 through 13, as if fully set forth herein.

15. Plaintiff, Pamela Reilly ("Pam"), is the mother of decedent Rosemarie Reilly.

16. Rosemarie was shot and killed at approximately 3:00 a.m. on November 6, 2016 by her ex-boyfriend, Jeremy Kelley (herein "Jeremy").

17. Rosemarie and Jeremy were in a romantic relationship while Rosemarie attended college at Grand Valley State University.

18. Upon information and belief, Rosemarie and Jeremy's relationship ended on or about the second week in September of 2016.

19. On or about October 1, 2016, Rosemarie spoke to her mother and explained that she and Jeremy were still living together, which caused her significant problems, and discussed her desire to move out of the residence that she and Jeremy shared.

20. On or about October 5, 2016, Jeremy was admitted to the Holland Hospital after attempting to commit suicide, telling Rosemarie that he had a gun to his head and was going to shoot himself.

21. Upon information and belief, Rosemarie was unable to locate Jeremy when he threatened suicide on October 5, but was able to speak to Jeremy's father, Defendant Sean Kelley, who tracked Jeremy's phone so that police could locate him.

22. While attempting to locate Jeremy, Defendant Sean Kelley spoke on multiple instances with Defendant Wallace along with other Grand Valley State police officers.

23. After getting out of the hospital following his October 5 suicide threat, Jeremy began stalking and harassing Rosemarie.

24. Upon information and belief, Jeremy contacted Rosemarie repeatedly on October 7, 2016, and his statements to her made her believe that he was going to try and attempt suicide again.

25. In part to avoid Jeremy's constant harassment after his suicide attempt, Rosemarie stayed at the apartment of her friend, Shelby Gird, and also at the house of her aunt and uncle, Noreen and David Rose.

26. Upon information and belief, on or about the early morning of October 8, 2017, Jeremy attempted to locate Rosemarie by calling Pam pretending to be Jeremy's boss, "Chad," and telling Pam that Jeremy had been taken to the hospital and that he needed Shelby's phone number so he could contact Rosemarie to obtain medical information for Jeremy.

27. These statements were lies and disturbing to Rosemarie.

28. On or about October 8, 2016, Rosemarie met her mother, Pam, for a late lunch, Pam observed that Rosemarie had a crooked nose and facial bruises, and Pam took Rosemarie to the hospital for treatment, where it was determined that she had suffered a broken nose.

29. At approximately 5:00 p.m. on or about October 8, 2016, Jeremy admitted to Pam during a phone conversation that he had hurt Rosemarie.

30. After leaving the hospital on October 8, 2016, Rosemarie called her father, John, and told him that during an argument with Jeremy, after he physically prevented her from leaving, Jeremy punched her in the face, arms, and legs several times, causing her broken nose among other injuries.

31. From October 8, 2016 through October 11, 2016, Jeremy called Rosemarie approximately forty three (43) times.

32. On or about October 11, 2016, Jeremy went to the house of Rosemarie's aunt and uncle, Noreen and David Rose, asking to see Rosemarie repeatedly, but was told she was not there.

33. After failing to locate Rosemarie on October 11, Jeremy called David Rose at approximately 11:10 p.m. and again threatened to kill himself, stating that he had a gun to his head.

34. After being told by Jeremy that he was holding a gun to his head, David called 911 and, upon information and belief, reported Jeremy's actions to Defendant Ottawa County Sheriff's Department.

35. Upon information and belief, an officer from Defendant Ottawa County Sheriff's Department acting on David's report that Jeremy threatened suicide contacted Jeremy by telephone, but the police took no further action regarding Jeremy's suicide attempt threat.

36. After the October 11 suicide threat, Jeremy continued stalking Rosemarie. On or about October 12, 2016, Jeremy came to Grand Valley State University's campus, where Rosemarie was a student, and jumped in front of Rosemarie's car before pounding on the window and head-butting her vehicle.

37. On or about October 12, 2016, Rosemarie contacted GVSU's Police Department and reported Jeremy for stalking, domestic violence/abuse, and for putting a gun to her head and threatening to kill her.

38. Rosemarie made her report to Defendant Wallace of the GVSU Police Department, who then contacted Defendant Ottawa County Sheriff's Department, who dispatched Defendant Dill to the GVSU campus to give Rosemarie paperwork required for filing a Personal Protection Order ("PPO").

39. Defendant Dill encouraged Rosemarie to file the PPO.

40. Defendant Wallace completed a "no trespassing" form for Jeremy along with creating an incident report based on stalking arising from the circumstances Rosemarie told him about; he also affirmatively suggested Rosemarie file a PPO against Jeremy.

41. Upon information and belief, on or about October 13, 2016, Defendant Tubergen of the OCSD visited Jeremy at Jeremy's home and told Jeremy to leave Rosemarie alone.

42. He did this based on Rosemarie's desire to file the PPO.

43. Sometime after he visited Jeremy on October 13, 2016, Officer Tubergen called Pam and told her that there was nothing that could be done to prevent Jeremy from calling Rosemarie, that he had seen Jeremy's guns and that Jeremy was legally allowed to own those guns, and that he was "well aware" that Jeremy's father, Sean Kelley, was a police officer.

44. At all times material and relevant, Jeremy's father, Sean Kelley, was a Patrol Officer with the Bloomfield Township Police Department in Bloomfield Township, Michigan.

45. During the October 13, 2016, telephone conversation, Pam told Defendant Tubergen that Jeremy had held a gun to Rosemarie's head and threatened to kill her with it. In response, Officer Tubergen told Pam that Rosemarie needed to file a report.

46. Upon information and belief, in response to Officer Tubergen's direction, on or about October 13, 2016, Rosemarie reported that Jeremy held a gun to her head and threatened to kill her to Defendant Chris Dill.

47. Also on October 13, 2016, Defendant Dill informed Jeremy over the telephone that he was not going to take Jeremy to jail despite his desire to question him regarding Rosemarie's complaint of domestic violence.

48. In the same telephone conversation with Jeremy, Jeremy informed Defendant Dill that he was upset Rosemarie had called the police and he believed she had obtained a PPO at that time.

49. Defendant DeHaan reviewed both Defendant Wallace's and Dill's reports on October 13.

50. Pam also called and spoke with Defendant DeHaan on October 13, 2016, wherein she informed him about Jeremy's stalking behavior, that Jeremy had several guns and was very unpredictable, and that she was concerned about Jeremy's father, Defendant Kelley, offering Jeremy bad advice regarding the situation with Rosemarie.

51. Defendant DeHaan informed Pam that he would follow up on the incident.

52. Defendant DeHaan spoke to Jeremy on the morning of October 13, 2016. During this phone con-

versation, he informed Jeremy he was inquiring into a report made about him by Rosemarie.

53. Defendant DeHaan also told Jeremy that because of his earlier actions he was banned from GVSU property, was not allowed on to enter any GVSU property, and not to contact any of the Reilly family members by phone, e-mail or any other electronic means as they do not wish to contact him.

54. On or about October 16, 2016, Pam Reilly spoke with Defendant Luce about the need to retrieve Rosemarie's belongings from Jeremy's residence and expressed concerns about Jeremy's possession of firearms, which she informed Defendant Luce Jeremy had previously threatened to kill Rosemarie with.

55. Upon information and belief, at the time of this October 16 phone conversation, Sgt. Luce knew that Jeremy's dad was a West Bloomfield police officer, had spoken to him, and stated that Jeremy was allowed to have guns and that there was no cause to remove them.

56. Pam called and spoke to the Ottawa County Sherriff's Department that day and asked them to meet Rosemarie and herself at Jeremy's trailer to retrieve her belongings.

57. Upon information and belief, Jeremy's father, Defendant Kelley, had spoken with officer(s) from Defendant OCSD prior to this encounter and on behalf of his son.

58. Upon arriving at Jeremy's trailer, Jeremy and an officer from Defendant OCSD were cordially standing in the parking lot waiting.

59. The officer initially was not going to supervise Rosemarie's removal of her things inside the trailer, was going to permit Jeremy and Rosemarie to be alone while she removed her things, and only did so upon request of the Reilly's.

60. On or about October 17, 2016, Rosemarie paid for the PPO and picked it up from the Kent County courthouse, signed by Judge Daniel Zemaitis. The PPO ordered that Jeremy was prohibited from, among other conduct: entering Rosemarie's residence, entering onto GVSU property, following Rosemarie, and contacting Rosemarie by phone or Facebook.

61. On or about October 18, 2016, Jeremy called Rosemarie three times despite Rosemarie attempting to block Jeremy's phone.

62. On or about October 19, 2016, Rosemarie contacted the GVSU police and reported to Defendant Wallace that Jeremy continued to call her and stalk her by entering onto the GVSU campus and following Rosemarie with his vehicle until she ran into a dining hall, where she called the police from.

63. On multiple instances Pam called the GVSU police expressing fear for both her daughters, specifically Rosemarie, as her other daughter Jennifer was with Rosemarie at the time.

64. Upon information and belief, officers from the GVSU Police Department went to Rosemarie's sister, Jennifer Reilly's, dorm room to check on Rosemarie after Pam Reilly called the GVSU police to tell them that Jeremy was violating the PPO.

65. Despite Jeremy's continued stalking of Rosemarie and Rosemarie's reports, no one attempted to arrest Jeremy.

66. Upon information and belief, during a telephone conversation that occurred on or about October 20, 2016, Jeremy's father, Defendant Sean Kelley, told Pam that Rosemarie was a liar and that they (Pam and John) needed to stop calling the police on Jeremy.

67. Upon information and belief, sometime during the last week of October 2016, Jeremy told Rosemarie and Jennifer Reilly that Jeremy's dad, Defendant Sean Kelley, had spoken to the local police and that "nothing was going to happen" to Jeremy for violating the PPO.

68. Rosemarie emailed Defendant Wallace on or around October 22, 2016, to which she explained that since they had last spoken when she informed him she obtained the PPO, Jeremy had tried to contact her 86 times through her phone, left her multiple voicemails, and emailed her University email address on multiple instances.

69. A warrant was prepared by Defendant OCSD for Jeremy's arrest on October 28, 2016, arising out of Rosemarie's report of domestic violence.

70. Pursuant to Defendant OCSD's policies, this warrant was mailed to Jeremy's residence.

71. Upon information and belief, Defendant Wallace mailed Jeremy a different warrant for his arrest on or around November 2, 2016, arising out of Rosemarie's complaint of his stalking to GVSU PD.

72. On or about November 4, 2016, Pam Reilly accompanied Rosemarie to a Grand Rapids garage to retrieve some of Rosemarie's personal belongings that were stored there.

73. While at the garage, Pam called 911 after believing she saw Jeremy and asked the police to send an officer out while Rosemarie removed her belongings from the garage.

74. The police refused to come to the garage, and because the garage manager would not unlock the garage without Jeremy being present, Pam and Rosemarie left.

75. The following day, on or about November 5, 2016, Jeremy spoke with John Reilly on the telephone and told John that he was with his step brother, Ryan Claffy, in Muskegon and would not be able to come open the garage. Jeremy further stated that he was aware that he had warrants out for his arrest, and John encouraged Jeremy to turn himself in and cooperate with the police.

76. Upon information and belief, either Jeremy's father or one of the Defendant police officers in the area also informed Jeremy he had a warrant for his arrest relating to the domestic violence incident but did not effectuate his arrest.

77. Upon information and belief, on or about November 6, 2016, Jeremy found Rosemarie at a friend's house located at 1450 Lake Dr. SE, Grand Rapids, MI 49605, and, at approximately 3:00 a.m., dragged Rosemarie from the residence by her hair, shot her multiple times in the torso with a black 9 mm Beretta pistol when she attempted to flee back into the house, then shot himself in the head.

78. Rosemarie, whose condition was noted by police as indicating that she had been involved in a struggle, was pronounced dead at the scene at approximately 3:22 a.m.

79. Jeremy, who upon information and belief was not deceased when police arrived, was transported to St. Mary's Hospital and was later pronounced dead from his injuries at approximately 3:42 a.m.

80. Upon information and belief, Defendants knew that Jeremy had a handgun in his possession yet permitted him to continue to possess the handgun despite continual knowledge of his prior threats of shooting Rosemarie.

81. Defendants knew of Jeremy's propensity for violence yet did nothing to protect Rosemarie Reilly.

82. The risk that Jeremy Kelley was out of control and dangerous to Rosemarie Reilly was obvious and known by Defendants.

83. Upon information and belief, it was told or communicated to local police that "nothing was going to happen" to Jeremy Kelley for violating his personal protection order.

84. Upon information and belief, local police, including the individually named Defendant officers, listened and acquiesced to Jeremy's father when he requested leniency for his son.

85. In the month preceding Rosemarie's death, Defendants put Jeremy on notice that he should stay away from Rosemarie (*i.e.* she made a police complaint about him), that Rosemarie filed a PPO against him, and that he had arrest warrant(s) out for his arrest

relating to the stalking and the domestic violence charge.

86. Defendants encouraged Rosemarie to file the PPO.

87. Jeremy's father's communications with the Defendant Officers, and the Officers' ensuing refusal to arrest and/or remove his guns, boldened Jeremy's belief that "nothing was going to happen" him, which in turn led to Rosemarie's death.

88. Defendants' regular communication with Jeremy, especially but not limited to after he continually violated the signed PPO, boldened his belief that "nothing was going to happen" him, which in turn led to Rosemarie's death.

89. The Defendants used apparent authority and refrained from arresting Jeremy Kelley for violating his protection order on four (4) separate occasions.

90. The Defendants actions constitute an affirmative act that either created the risk or increased the risk of danger to Rosemarie Reilly placing her in substantial risk of serious immediate and proximate harm which was the cause of her death.

91. The Defendants affirmative actions are outrageous and shock the conscience.

COUNT I FOURTEENTH AMENDMENT VIOLATIONS UNDER 42 U.S.C. § 1983 AS TO (ALL/INDIVIDUAL) DEFENDANTS

92. Plaintiff reasserts and re-alleges each and every allegation contained in paragraphs 1 through 91, as if fully set forth herein.

93. This action is brought pursuant to 42 U.S.C. § 1983 against Defendants in their individual capacities for depriving Plaintiff of her constitutionally protected due process interest, under color of law, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

94. Plaintiff's decedent had a clearly established right, under the Fourteenth Amendment to the United States Constitution, to be free from danger created by the state.

95. The acts and/or omissions of Defendants, constituted deliberate indifference to Plaintiff's right, in violation of the Fourteenth Amendment.

96. These claims are cognizable under 42 U.S.C. § 1983.

97. As a result of Defendants' conduct complained of herein, Plaintiff suffered deprivation of clearly established and well-settled rights protected and secured by the Fourteenth Amendment to the United States Constitution.

98. Defendants, individually, were deliberately indifferent to Plaintiff's decedent, which was a proximate cause of her death and conscious suffering.

99. Defendants are not entitled to governmental or qualified immunity.

100. Pursuant to 42 U.S.C. § 1983, Defendants are liable to Plaintiff for all damages allowed under federal law. To the extent that the damages allowable and/or recoverable are deemed insufficient to fully compensate Plaintiff and/or to punish or deter the Defendants, this Court must order additional damages to be allowed so as to satisfy any and all such

inadequacies. Defendants' conduct was and remains extreme and outrageous subjecting Defendants to punitive damages.

101. As a result of the Defendants' actions and/or omissions, Plaintiff has the following damages:

a. Special damages in the form of medical, funeral, and burial expenses;

b. Compensatory damages;

c. Conscious pain and suffering;

d. Loss of companionship;

e. Punitive damages;

f. All damages allowable under Michigan law, including but not limited to the Michigan Wrongful Death Act, M.C.L. § 600.2922;

g. All damages allowable under Federal law, including but not limited to 42 U.S.C. § 1983; and

h. Reasonable costs and attorney's fees under 42 U.S.C. § 1988.

WHEREFORE, Plaintiff Pamela Reilly, as Personal Representative of the Estate of Rosemarie Reilly, prays for a judgment against Defendants, jointly and severally, including punitive damages and attorney's fees and costs pursuant to 42 U.S.C. § 1988, and all allowable interest thereon.

COUNT II MUNICIPAL LIABILITY AS TO DEFENDANT OTTAWA COUNTY

102. Plaintiff reasserts and re-alleges each and every allegation contained in paragraphs 1 through 101, as if fully set forth herein.

103. Defendant Ottawa County's liability as a municipality arises out of *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

104. Defendant Ottawa County through their policy making officials:

a. Failed to establish, implement, and/or execute adequate policies, procedures, rules and regulations to protect individuals, such as Rosemarie Reilly, from individuals with violent tendencies or who had PPOs against them;

b. Failed to establish, implement, and/or execute adequate policies, procedures, rules and regulations to protect individuals, such as Rosemarie Reilly, from individuals against whom arrest warrants had been issued.

c. Defendant's policy, procedures, regulations, and customs, and/or its failure to enact the same, caused and was the driving force behind the violations of Plaintiff's constitutional rights as alleged in this Complaint.

d. Failing to properly train its employees, including the above-named Defendant.

e. Failed to establish, implement, and/or execute adequate policies, procedures, rules and regulations that ensured officers from

different police departments—Defendant Kelley—could improperly influence investigations and/or police conduct.

105. At all times material hereto, Defendant Ottawa County, through its agents, was deliberately indifferent to the strong likelihood that constitutional violations, such as those in the instant case, would occur, and pursued policies, practices, and customs that were a direct and proximate cause of the deprivations of Plaintiff's decedent's constitutional rights.

106. These claims are cognizable under 42 U.S.C. § 1983.

107. The customs, policies and/or practices of Defendant Ottawa County were a proximate cause of the death and conscious suffering of Plaintiff's decedent for the aforementioned reasons.

108. As a result of the Defendants' actions and/or omissions, Plaintiff has the following damages:

a. Special damages in the form of medical, funeral, and burial expenses;

b. Compensatory damages;

c. Conscious pain and suffering;

d. Loss of companionship;

e. Punitive damages;

f. All damages allowable under Michigan law, including but not limited to the Michigan Wrongful Death Act, M.C.L. § 600.2922;

g. All damages allowable under Federal law, including but not limited to 42 U.S.C. § 1983; and

h. Reasonable costs and attorney's fees under 42 U.S.C. § 1988.

WHEREFORE, Plaintiff Pamela Reilly, as Personal Representative of the Estate of Rosemarie Reilly, prays for a judgment against Defendants, jointly and severally, including punitive damages and attorney's fees and costs pursuant to 42 U.S.C. § 1988, and all allowable interest thereon.

COUNT III WRONGFUL DEATH AS TO DEFENDANTS TUBERGON, DILL, LUCE, WALLACE, DEHAAN AND KELLEY

109. Plaintiff reasserts and re-alleges each and every allegation contained in paragraphs 1 through 108, as if fully set forth herein.

110. Plaintiff's decedent suffered injuries resulting in death caused by Defendants' wrongful conduct, and if death had not ensued, Plaintiff's decedent would have been entitled to maintain an action and recover damages. MCL § 600.2922.

111. The Defendants' aforementioned acts and/or omissions were a proximate cause of Plaintiff's decedent's death.

112. The acts and/or omissions of Defendants Eric Tubergen, Chris Dill, Dennis Luce, Collin Wallace, Brandon DeHaan and Sean Kelley constituted gross negligence under state law.

113. The acts and/or omissions of Defendants Eric Tubergen, Chris Dill, Dennis Luce, Collin Wallace,

Brandon DeHaan and Sean Kelley were intentional, wanton and willful, and/or grossly negligent and Defendants are therefore not entitled to governmental immunity under state law, MCL § 691.1407.

114. Defendants' gross negligence was a proximate cause of the injuries, including the death of Plaintiff's decedent.

115. As a result of the Defendants' actions and/or omissions, Plaintiff has the following damages:

a. Special damages in the form of medical, funeral, and burial expenses;

b. Compensatory damages;

c. Conscious pain and suffering;

d. Loss of companionship;

e. Punitive damages;

f. All damages allowable under Michigan law, including but not limited to the Michigan Wrongful Death Act, M.C.L. § 600.2922;

g. All damages allowable under Federal law, including but not limited to 42 U.S.C. § 1983; and

h. Reasonable costs and attorney's fees under 42 U.S.C. § 1988.

WHEREFORE, Plaintiff Pamela Reilly, as Personal Representative of the Estate of Rosemarie Reilly, prays for a judgment against Defendants, jointly and severally, including punitive damages and attorney's fees and costs pursuant to 42 U.S.C. § 1988, and all allowable interest thereon.

COUNT IV CIVIL CONSPIRACY AS TO DEFENDANTS TUBERGON, DILL, LUCE, WALLACE, DEHAAN AND KELLEY

116. Plaintiff reasserts and re-alleges each and every allegation contained in paragraphs 1 through 115, as if fully set forth herein.

117. Defendants Tubergon, Dill, Luce, Wallace, Dehaan and Kelley violated Plaintiff's decedent's civil rights as identified herein, including by:

a. Allowing Jeremy Kelley to remain out of police custody despite numerous violations of a PPO and despite Defendants' knowledge that Jeremy Kelley possessed firearms;

b. Waiting to arrest Jeremy Kelley pursuant to an arrest warrant for domestic violence and mailing said warrant to Jeremy Kelley's residence;

c. Speaking with Jeremy Kelley's father, Defendant Kelley, and listening to his efforts regarding leniency for his son;

d. Other violations of Plaintiff's decedent's civil rights learned through the course of discovery.

118. Upon information and belief, Defendants violated Plaintiff's decedent's civil rights pursuant to an agreement with or in concert with Defendant Sean Kelley.

119. Defendants were acting within the course and scope of their employment as police officers when they conspired with Defendant Kelley.

120. As a result of the Defendants' actions and/or omissions, Plaintiff has the following damages:

a. Special damages in the form of medical, funeral, and burial expenses;

b. Compensatory damages;

c. Conscious pain and suffering;

d. Loss of companionship;

e. Punitive damages;

f. All damages allowable under Michigan law, including but not limited to the Michigan Wrongful Death Act, M.C.L. § 600.2922;

g. All damages allowable under Federal law, including but not limited to 42 U.S.C. § 1983; and

h. Reasonable costs and attorney's fees under 42 U.S.C. § 1988.

WHEREFORE, Plaintiff Pamela Reilly, as Personal Representative of the Estate of Rosemarie Reilly, prays for a judgment against Defendants, jointly and severally, including punitive damages and attorney's fees and costs pursuant to 42 U.S.C. § 1988, and all allowable interest thereon.

RESPECTFULLY SUBMITTED:

THE RASOR LAW FIRM

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Dated: November 2, 2018

DEMAND FOR JURY TRIAL
(NOVEMBER 2, 2018)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAMELA REILLY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSEMARIE REILLY,

Plaintiff,

v.

OTTAWA COUNTY, A MUNICIPAL CORPORATION; OFFICER ERIC TUBERGEN, IN HIS INDIVIDUAL CAPACITY; SERGEANT CHRIS DILL, IN HIS INDIVIDUAL CAPACITY; POLICE OFFICER COLLIN WALLACE, IN HIS INDIVIDUAL CAPACITY; SERGEANT DENNIS LUCE, IN HIS INDIVIDUAL CAPACITY; CAPTAIN BRANDON DEHAAN, IN HIS INDIVIDUAL CAPACITY; and SEAN KELLEY, IN HIS INDIVIDUAL CAPACITY,

Defendants.

Case No. 1:18-cv-1149

Before: Hon. Janet T. NEFF, United States District Judge, Mag. Ellen S. CARMODY, U.S. Magistrate Judge.

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NOW COMES Plaintiff, PAMELA REILLY, as Personal Representative for the Estate of Rosemarie Reilly, by and through her attorneys, RASOR LAW FIRM, PLLC, and hereby demands a trial by jury in the above-captioned cause of action.

RESPECTFULLY SUBMITTED:

THE RASOR LAW FIRM

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Dated: November 2, 2018