Case No. 20-10830

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Terrence Harmon; Sherley Woods, as Administratrix for the Estate of OShea Terry,

Plaintiffs – Appellants

v.

City of Arlington, Texas; Bau Tran,

Defendants – Appellees

Appeal from the United States District Court
For the Northern District of Texas
Fort Worth Division
(District Court No. 4:19-CV-696)

BRIEF OF CITY OF ARLINGTON, DEFENDANT - APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

1. No. 20-10830; Terrence Harmon; Sherley Woods, as Administratrix for the Estate of OShea Terry, Plaintiffs – Appellants v. City of Arlington, Texas; Bau Tran, Defendants – Appellees.

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

The City of Arlington believes this matter should be submitted for decision on the briefs. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Accordingly, Arlington does not request oral argument. However, if Terrence Harmon and Sherley Woods, as Administratrix for the Estate of OShea Terry, are allowed to present oral argument, the City of Arlington requests that it also be allowed to present oral argument.

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City of Arlington, Texas; Bau Tran,

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BRIEF OF CITY OF ARLINGTON, DEFENDANT – APPELLEE

TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

COMES NOW City of Arlington ("Arlington"), Defendant – Appellee, and files this brief. The District Court granted Arlington's motion to dismiss the claims of Terrence Harmon "Harmon" and Sherley Woods, as Administratrix for the Estate of Oshea Terry "Woods".[1] Harmon and Woods did not allege any non-speculative connection between their alleged constitutional deprivations and any custom of Arlington.[2] Accordingly, the District Court's dismissal should be

[1]ROA.343-364. 365. Order granting motions to dismiss for failure to state a claim; Order dismissing case with prejudice. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, No. 4:19-cv-00696-O, 2020 WL 6018819 (N.D. Tex. Aug. 12, 2020).
[2]ROA.356-359. *See id*., Slip Op. at 2. *See also* ROA.191-197. Plaintiffs' Amended Complaint, pp.6-12.

affirmed. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Likewise, Mr. Harmon failed to allege a deprivation of his own constitutional rights.[3] The District Court properly dismissed Mr. Harmon's claims as a bystander because Officer Tran's action was not directed at Mr. Harmon.[4]

I.
STATEMENT OF THE ISSUES

Harmon and Woods frame the issues as follows:

Issue 1.

> Whether it violates clearly established law to shoot an unarmed person who is not suspected of any violent offense, within one second when he begins driving away from the officer.[5]

Harmon's and Woods's statement of Issue 1 is not in accord with their own factual allegations because the issue omits the critical fact that Officer Tran was standing on the vehicle's running board as Mr. Terry began to move forward.[6]

Issue 2.

> Whether the vehicle's passenger was seized by the officer shooting the vehicle's driver, which subsequently

[3]ROA.186, 190, 203-204. *See* Plaintiffs' Amended Complaint, p.1, ¶ 2, p.5, ¶¶ 31-34, p.18, ¶ 146, p.19, ¶ 150.
[4]ROA.343-364. 365. Order granting motions to dismiss; Order dismissing case with prejudice.
[5]*See* Appellants' Opening Brief, p.1.
[6]ROA.190. *See* Plaintiffs' Amended Complaint, p.5, ¶31; ROA.344. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, No. 4:19-cv-00696-O, 2020 WL 6018819, Slip Op. at 2 (N.D. Tex. Aug. 12, 2020).

> stopped the vehicle, such that the passenger can bring a Fourth Amendment excessive force claim.[7]
>
> Issue 3.
>
> Whether the Complaint adequately stated a claim for municipal liability against the city, based on the police department's customs of not disciplining the officer for his bad behavior and of using excessive force, in particular against Black men.[8]

II.
STATEMENT OF THE CASE

The Statement of Facts is presented first, followed by the Statement of Procedural History. Arlington has also included a statement regarding the video recordings incorporated into Harmon's and Woods's complaint.

A. Statement of Facts.

The following factual background is taken, at this stage of the proceedings, from the Plaintiffs' Amended Complaint.[9] For this appeal, Arlington is required to treat the Harmon's and Woods's factual allegations as true. *See Zinermon v. Burch*, 494 U.S. 113, 118 (1990) ("For purposes of review of a Rule 12(b)(6) dismissal, the factual allegations of [the plaintiff's] complaint are taken as true."); *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007) (per

[7]*See* Appellants' Opening Brief, p.1.
[8]*See id*.
[9]ROA.186-206. *See* Plaintiffs' Amended Complaint.

curiam) ("The court 'accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'") But Arlington is not conceding that Harmon's and Woods's allegations are true.

Harmon and Woods allege that Arlington Police Officer Julie Herlihy stopped O'Shea Terry and Terrence Harmon on September 1, 2018, at approximately 1:40 p.m. because Officer Herlihy "allegedly" observed that the temporary registration tag on the vehicle was expired.[10] Mr. Terry and Mr. Harmon provided "identifying information" to Officer Herlihy.[11]

Harmon and Woods allege that Officer Herlihy detained Mr. Terry and Mr. Harmon "alleging she smelled marijuana emanating from the vehicle."[12] A second Officer, Bau Tran, arrived at the scene and approached the vehicle from the passenger side.[13] Officer Tran "ordered the men to lower their windows and to shut off the vehicle's engine, to which they complied."[14]

Harmon and Woods allege "The only evidence that Terry or Harmon had committed a crime was the alleged smell of marijuana emanating from the vehicle."[15] They further allege that: "There was no evidence known to Officer

[10]ROA.189. *See* Plaintiffs' Original Complaint, p.4, ¶ 18.
[11]ROA.189. *See id*. at ¶ 19.
[12]ROA.189. *See id*. at ¶ 20.
[13]ROA.189. *See id*. at ¶ 21.
[14]ROA.189. *See id*. at ¶ 22.
[15]ROA.189. *See id*. at ¶ 23.

Herlihy or Tran at this time which suggested that Terry or Harmon had committed a felony."[16] However, Texas law provides that possession of marijuana (also spelled marihuana) can be a misdemeanor or a felony depending on the amount possessed. *See* TEX. HEALTH & SAFETY CODE § 481.121. Specifically, Section 481.121 provides in part:

> § 481.121. Offense: Possession of Marihuana
>
> (a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.
> (b) An offense under Subsection (a) is:
> (1) a Class B misdemeanor if the amount of marihuana possessed is two ounces or less;
> (2) a Class A misdemeanor if the amount of marihuana possessed is four ounces or less but more than two ounces;
> (3) a state jail felony if the amount of marihuana possessed is five pounds or less but more than four ounces; …

Id. Harmon and Woods conveniently omit any allegation about the amount of marijuana found in the vehicle.[17] In any event, the implication that possession of marijuana in Texas can be no more than a misdemeanor does not represent Texas law. *See* TEX. HEALTH & SAFETY CODE § 481.121.

Harmon and Woods further allege:

[16]ROA.189. *See id*. at ¶ 24.
[17]ROA.189-191. *See* Plaintiffs' Amended Complaint, pp.4-6, ¶¶ 18-42.

> "Throughout the entirety of the encounter, Tran was positioned adjacent to the passenger side door of Mr. Terry's vehicle."[18]
>
> "Mr. Terry rolled the windows of the SUV upward and started moving forward."[19]
>
> "In an effort to gain a good angle to shoot Mr. Terry, Defendant Tran proceeded to grab onto the passenger window and climb onto the side of the vehicle, reaching for his service weapon with his right hand."[20]
>
> "As Terry's vehicle began to move forward, Tran stuck his gun through the passenger window – mere inches away from the face of Harmon – and fired at least four shots at Terry."[21]
>
> "The bullets struck Terry once in his left thigh and three times in his torso."[22]

Mr. Harmon never alleges that any use of force by Officer Tran was directed at Mr. Harmon or that Officer Tran aimed his firearm at Mr. Harmon.[23] Mr. Harmon had no physical injury.[24] Rather, Mr. Harmon alleges he "suffered extreme and severe mental and emotional distress, agony and anxiety."[25]

B. The video recordings.

On the second page of their live complaint, Harmon and Woods chose to incorporate a YouTube link into their complaint of "video evidence" released by

[18]ROA.190. *See id*. at p.5, ¶ 28.
[19]ROA.190. *See id*. at ¶ 30.
[20]ROA.190. *See id*. at ¶ 31 (underlining added).
[21]ROA.190. *See id*. at ¶ 32 (underlining added).
[22]ROA.190. *See id*. at ¶ 33 (underlining added).
[23]ROA.189-191. *See id*. at pp.4-6, ¶¶ 18-42.
[24]ROA.189-191. *See id*.

the Arlington Police Department.[26] The YouTube link is: https://www.youtube.com/watch?v=bh08la7J0_s .[27] Harmon and Woods continue to rely on the video in their briefing before this Court. They open their introduction of their brief by saying: "This case arises from a deadly police shooting at a traffic stop that was captured on video."[28] Harmon and Woods conclude their introduction, saying: "Viewing the facts—and the video—in the light most favorable to Plaintiffs, these claims should make it to discovery."[29]

Although the standard of review for a motion to dismiss requires that factual allegations be taken as true (*Zinermon*, 494 U.S. at 118; *Sonnier*, 509 F.3d at 675), the standards certainly do not require that a video be viewed "in the light most favorable to Plaintiffs". *See Scott v. Harris*, 550 U.S. 372, 380-381 (2007). Rather, the facts shown in an undisputed video are taken as true and control over factual allegations. *See id*. The District Court specifically noted this and further noted that some of the material allegations by Harmon and Woods were clearly contradicted by the video; the District Court explained:

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[25]ROA.190. *See id*. at p.5, ¶ 34.
[26]ROA.187.
[27]ROA.187. *See id*.
[28]*See* Appellants' Opening Brief, p.2.
[29]*See id.* at p.4 (underlining added).

> Although the alleged facts are taken as if they are true, facts established by a video record control when they clearly contradict the facts contained in a pleading. *See Scott v. Harris*, 550 U.S. 372, 380-81 (2007); *See also U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 377 (5th Cir. 2004). Here, Plaintiffs have effectively attached a video of the incident to their complaint (the video can be found at [https://www.youtube.com/watch?v=bh081a7J0_s]). There are several points of material fact on which the video clearly contradicts Plaintiffs' alleged facts. On these facts the video will control.

ROA.344. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, No. 4:19-cv-00696-O, 2020 WL 6018819, Slip Op. at 6-9 (N.D. Tex. Aug. 12, 2020) (Doc. 37, PageID 337-358).

C. Statement of Procedural History.

Harmon's and Woods's live pleading is "Plaintiffs' Amended Complaint" (Doc. 26) filed on November 25, 2019.[30] Harmon and Woods allege civil rights violations under the Fourth Amendment and seek redress under 42 U.S.C. § 1983.[31] Harmon and Woods allege that Officer Tran used excessive force that resulted in the death of Mr. Terry.[32] In addition, Terrence Harmon alleges a bystander claim for being in close proximity.[33] Specifically, Mr. Harmon alleged Officer Tran "used excessive and deadly force" by "pointing his firearm across

[30]ROA.186-206. *See* Doc. 26, filed 11/25/19.
[31]ROA.187. *See* Plaintiffs' Amended Complaint, at p.2, ¶ 4.
[32]ROA.187. *See id*.
[33]ROA.186, 190, 203, 204. *See id*. at p.1, ¶ 2, p.5, ¶¶ 31-34, p.18, ¶ 146, p.19, ¶ 150.

Harmon's face and discharging it, killing Terry."[34] As to Arlington, the gist of Harmon's and Woods's claims assert (1) an alleged "custom of using excessive or improper force" and (2) alleged "training and disciplinary failures".[35]

The case is before the Court on a grant of Arlington's Motion to Dismiss Plaintiffs' Amended Complaint.[36] The case progressed, procedurally, as follows:

Sept. 4, 2019	Plaintiffs' Complaint.[37]
Sept. 25, 2019	Defendant City of Arlington's Motion to Dismiss Under Rule 12(b)(1) and 12(b)(6) and Brief.[38]
Oct. 16, 2019	Plaintiffs' Response in Opposition to Defendant The City of Arlington's Motion to Dismiss the First Amended [sic] Complaint.[39]
Oct. 24, 2019	Joint Report filed by parties.[40]
Oct. 30, 2019	Defendant City of Arlington's Reply to Plaintiffs' Response in Opposition to Arlington's Motion to Dismiss.[41]
Nov. 4, 2019	Bau Tran's Motion & Brief to Dismiss.[42]
Nov. 4, 2019	Bau Tran's Answer Asserting Qualified Immunity.[43]

[34]ROA.203. *See id*. at p.18, ¶ 146.
[35]ROA.200. *See id*. at p.15, ¶ 132.
[36]ROA.42-66, 215-239, 343-364, 365. *See Arlington's* Motion to Dismiss for Failure to State a Claim filed By City of Arlington; Arlington's Motion to Dismiss Plaintiffs' Amended Complaint; Order (Doc. 37, PageID 337-358); Order (Doc. 38, PageID 359).
[37]ROA.7-25.
[38]ROA.38-66.
[39]ROA.92-103.
[40]ROA.104-114.
[41]ROA.115-127.
[42]ROA.128-158.

Nov. 4, 2019	Defendant Bau Tran's Motion & Brief to Stay Discovery & Disclosures.[44]
Nov. 8, 2019	Order granting Defendant Bau Tran's Motion & Brief to Stay Discovery & Disclosures.[45]
Nov. 25, 2019	Plaintiffs' Amended Complaint.[46]
Dec. 9, 2019	Defendant City of Arlington's Motion to Dismiss Plaintiffs' Amended Complaint (Doc. 26) Under Rule 12(b)(6) and Brief.[47]
Dec. 23, 2019	Plaintiffs' Response in Opposition to Defendant The City of Arlington's Motion to Dismiss the First Amended Complaint.[48]
Jan. 6, 2020	Defendant City of Arlington's Reply to Plaintiffs' Response in Opposition to Arlington's Motion to Dismiss the First Amended Complaint.[49]
Jan. 8, 2020	Bau Tran's Second Motion to Dismiss & Brief.[50]
Jan. 8, 2020	Bau Tran's Answer to Plaintiffs' Amended Complaint Asserting Qualified Immunity.[51]
Jan. 22, 2020	Plaintiffs' Response in Opposition to Defendant Bau Tran's Motion to Dismiss the First Amended Complaint.[52]

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[43]ROA.159-175.
[44] ROA.176-180.
[45]ROA.185.
[46]ROA.186-206.
[47]ROA.211-239.
[48]ROA.240-252.
[49]ROA.256-268.
[50]ROA.269-299.
[51]ROA.300-318.

Feb. 5, 2020	Bau Tran's Reply Brief Opposing Plaintiffs' Response to Second Motion to Dismiss.[53]
Aug. 12, 2020	Order granting motions to dismiss of both defendants.[54]
Aug. 12, 2020	Order dismissing case with prejudice.[55]
Aug. 13, 2020	Plaintiffs' Notice of Appeal.[56]
Aug. 24, 2020	Appeal docketing letter from the Court.[57]

III.
SUMMARY OF THE ARGUMENT

The District Court granted Arlington's motion to dismiss on two independent grounds.[58] Both were proper, and both were based on longstanding law.[59] In addition, Arlington cannot be liable for the shooting of Mr. Terry because Officer Tran did not violate Mr. Terry's constitutional rights.[60] The District Court's judgment should be affirmed.

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[52]ROA.319-331.
[53]ROA.332-342.
[54]ROA.343-364. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, No. 4:19-cv-00696-O, 2020 WL 6018819, Slip Op. at 6-9 (N.D. Tex. Aug. 12, 2020).
[55]ROA.365.
[56]ROA.366.
[57]ROA.367-369.
[58]ROA.343-364, 365. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, No. 4:19-cv-00696-O, 2020 WL 6018819, Slip Op. at 6-9 (N.D. Tex. Aug. 12, 2020). Order (Doc. 37, PageID 337-358); Order (Doc. 38, PageID 359).
[59]ROA.343-364, 365. *See id.*
[60]ROA.348-352. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, No. 4:19-cv-00696-O, 2020 WL 6018819, Slip Op. at 6-10 (N.D. Tex. Aug. 12, 2020).

A. No constitutional violation occurred with regards to Mr. Terry or Mr. Harmon; thus, Arlington cannot be liable for Officer Tran's conduct.

The District Court expressly found that Officer Tran's shooting of Mr. Terry did not violate the Fourth Amendment.[61] For the reasons explained in the District Court's opinion[62] and Officer Tran's briefing before this Court, the District Court's finding of no constitutional violation should be affirmed. Likewise, the District Court found that Mr. Harmon's claim, as a bystander, did not state a claim upon which relief could be granted.[63] Accordingly, the dismissal of the claims against Arlington were properly dismissed.[64] *See* FED. R. CIV. P. 12(b)(6); *see also Elizondo v. Green*, 671 F.3d 506, 510-11 (5th Cir. 2012) ("[I]n the absence of a constitutional violation, there can be no municipal liability for the City."); *James v. Harris Cnty.*, 577 F.3d 612, 617 (5th Cir. 2009) ("To hold a municipality liable under § 1983 for the misconduct of an employee, a plaintiff must show, *in addition to a constitutional violation*, that an official policy promulgated by the municipality's policymaker was the moving force behind, or actual cause of, the constitutional injury.") (emphasis added).

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[61]ROA.348-352. *See id.*
[62]*Id*.
[63]ROA.352-354. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, No. 4:19-cv-00696-O, 2020 WL 6018819, Slip Op. at 10-12 (N.D. Tex. Aug. 12, 2020).

B. All claims against Arlington fail under *Monell*.

No claims can survive against Arlington unless Harmon and Woods have stated a claim under the standards established by *Monell*. *See Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 690-91 (1978). Harmon and Woods do not rely on any formal policy of Arlington.[65] Rather they rely on speculative custom allegations.[66] In an attempt to establish custom, Harmon and Woods rely on a limited number of unrelated incidents.[67] The facts of the incidents vary widely and do not establish custom.[68] Interestingly, Harmon's and Woods's version of two of the other incidents involving Black males, along with the case at hand, acknowledge that each individual refused to obey the officers commands before the officer used his firearm.[69] Likewise, Harmon and Woods fail to provide details necessary to raise their failure to discipline claim beyond the speculative level. Moreover, Harmon and Woods fail to demonstrate the alleged customs were the moving force driving Officer Tran's use of force. These allegations fail to establish that Arlington had a custom of violating the rights of citizens.

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[64]ROA.343-364. *Id*., Slip Op. at 1-22.
[65]ROA.191-197, 200-201, 204. *See* Plaintiffs' Original Complaint, pp.6-12; p.15-16, ¶¶ 132, 134; p.19, ¶¶ 151, 153.
[66]ROA.191-197, 200-201, 204. *See id.*
[67]ROA.191-197. *See id*., pp.6-12.
[68]ROA.191-197. *See id*.
[69]ROA.189-190, 194. *See id*., pp.4-5, ¶¶ 22, 30, p.9, ¶¶ 74, 79.

C. Federal law does not recognize a bystander claim under § 1983 by an individual who witnesses police action, but was not the object of that action.

Mr. Harmon has failed to allege a deprivation of his own constitutional rights.[70] As outlined above, Harmon and Woods included detailed factual allegations showing that Officer Tran never aimed his firearm at anyone other than Mr. Terry.[71] Mr. Harmon's allegations – as stated in the complaint – repeatedly admit that Officer Tran shot directly at Mr. Terry.[72] Mr. Harmon's primary complaint (as stated in his live complaint) concerned the proximity of the firearm to Mr. Harmon's face at the time the shots were fired.[73] Moreover, Mr. Harmon never alleges that he suffered any physical injuries, including minor injuries.[74] Mr. Harmon was not the object of the complained-of use of force by Officer Tran.[75] Thus, Mr. Harmon has no claim to make.

Because Mr. Harmon's bystander claim failed in the district court, he attempts to make a new argument – for the first time on appeal – that Officer Tran's act of shooting Mr. Terry (the driver) seized Mr. Harmon by causing the vehicle to stop. But Mr. Harmon cannot change his argument on appeal. *See AG*

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[70]ROA.186, 190, 203-204. *See* Plaintiffs' Amended Complaint, p.1, ¶ 2, p.5, ¶¶ 31-34, p.18, ¶ 146, p.19, ¶ 150.
[71]ROA.186, 190, 203-204. *See id*.
[72]ROA.186, 190, 203. *See id*., p.1, ¶ 2, p.5, ¶¶ 31-34, p.18, ¶ 146, p.19.
[73]ROA.186, 190, 203. *See id.*
[74]ROA. 190, 203. *See id*. at p.5, ¶ 34, p.18, ¶ 148.

Acceptance Corp. v. Veigel, 564 F.3d 695, 700 (5th Cir. 2009); *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916 (5th Cir. 1996). In any event, Mr. Harmon's live allegations establish that he was a bystander and nothing more. For the reasons stated in the District Court's opinion and in the briefing below, the District Court's dismissal of Mr. Harmon's claims should be affirmed.[76]

IV.
ARGUMENTS

First, Arlington cannot be liable for the shooting of Mr. Terry or for Mr. Harmon's bystander claims because Officer Tran did not violate the constitutional rights of either Mr. Terry or Mr. Harmon.[77] Second, Harmon and Woods failed to sufficiently identify a policy or custom of Arlington that was the moving force of the alleged harm. *See Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 690-691 (1978). Third, Harmon failed to show that his own constitutional rights were violated.[78]

A. Standard of Review for a Rule 12(b)(6) Motion to Dismiss.

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[75]ROA.186, 190, 203-204. *See id*., p.1, ¶ 2, p.5, ¶¶ 31-34, p.18, ¶ 146, p.19, ¶ 150.
[76]ROA.352-355. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, No. 4:19-cv-00696-O, 2020 WL 6018819, Slip Op. at 2 (N.D. Tex. Aug. 12, 2020).
[77]ROA.346-355. Slip Op. at pp.4-13.
[78]ROA.186, 190, 203-204. *See* Plaintiffs' Amended Complaint, p.1, ¶ 2, p.5, ¶¶ 31-34, p.18, ¶ 146, p.19, ¶ 150.

The Fifth Circuit's review of a trial court's dismissal for failure to state a claim under Rule 12(b)(6) is de novo. *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995); *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). "The dismissal of a complaint under Fed.R.Civ.P. 12(b)(6) is a question of law, and is not entitled to the same deference as determinations involving fact questions." *Fernandez-Montes*, 987 F.2d at 284 n.9.

Rule 12(b)(6) recognizes that the failure to state a claim upon which relief can be granted is a defense to a claim. *See* FED. R. CIV. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility standard requires more of plaintiffs than simply alleging facts that indicate relief is possible; the Supreme Court explained:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. 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. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id. (internal citations omitted). When "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at

679 (quoting FED. R. CIV. P. 8(a)(2)). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id*. at 679.

"While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id*. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id*. at 678 (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id*. (quoting *Twombly*, 550 U.S. at 557). Pleadings that consist of "no more than conclusions, are not entitled to the assumption of truth." *Id*. at 679. In short, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez-Montes*, 987 F.2d at 284.

The devotion to the plaintiff's complaint does not extend to "conclusory allegations or unwarranted deductions of fact." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). Courts should not "strain to find inferences favorable to the plaintiffs". *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005). Since their inception, the federal rules have "insisted on more than conclusions, *and in this sense*, have never been a system of notice pleading." *See*

Schultea v. Wood, 47 F.3d 1427, 1431 (5th Cir. 1995) (en banc). Moreover, "[d]ismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief." *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995) (citing 2A Moore's Federal Practice ¶ 12.07 [2.-5] at 12-91).

B. No constitutional violations occurred with regard to Mr. Terry (or Mr. Harmon); thus, Arlington cannot be liable for Officer Tran's conduct.

Issue 1.

> Whether it violates clearly established law to shoot an unarmed person who is not suspected of any violent offense, within one second when he begins driving away from the officer.[79]

The District Court expressly found that Officer Tran's shooting of Mr. Terry did not violate the Fourth Amendment.[80] For the reasons explained in the District Court's opinion, and Officer Tran's briefing before this Court (which Arlington adopts by reference through FED. R. APP. P. 28(i)), the District Court's finding of no constitutional violation should be affirmed.

Harmon's and Woods's primary argument is to simply ignore the fact that Officer Tran was physically on Mr. Terry's vehicle when Mr. Terry chose to drive

[79] *See* Appellants' Opening Brief, p.1.
[80] ROA.348-352. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, No. 4:19-cv-00696-O, 2020 WL 6018819, Slip Op. at 6-10 (N.D. Tex. Aug. 12, 2020).

away.[81] The attempt to argue a different case is illustrated in their statement of Issue 1, where Harmon and Woods say Mr. Terry "begins driving away from the officer."[82] Harmon and Woods desperately hope the Court will believe that Officer Tran was standing next to the vehicle, as opposed to standing on the vehicle, when Mr. Terry disobeyed orders and begin to drive away. Even Harmon's and Woods's alleged version of facts in their complaint states that Officer Tran had "climb[ed] onto the side of the vehicle" as "Terry's vehicle began to move forward".[83] In any event, the video – which Harmon and Woods chose to incorporate into their complaint – is controlling. *See Scott v. Harris*, 550 U.S. 372, 380-381 (2007). The video clearly shows that Officer Tran is on Mr. Terry's vehicle when Mr. Terry begins to drive away from the stop.[84]

It seems as though Harmon and Woods would expect the officer to have waited to take action. But this does not make sense because Harmon and Woods also argue, inconsistently, that Officer Tran's action of shooting the driver put Mr. Harmon in harm's way.[85] Moreover, Harmon and Woods argue, again inconsistently, that Mr. Harmon who was inside the vehicle was endangered, but

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[81]ROA.187, 190. *See* video referenced in Plaintiffs' Amended Complaint, p.2, ¶ 3; *see also* Plaintiffs' Amended Complaint, p.5, ¶¶ 30-32.
[82]*See* Appellants' Opening Brief, p.1 (underlining added).
[83]ROA.190. *See* Plaintiffs' Amended Complaint, p.5, ¶¶ 30-32.
[84]ROA.187. The YouTube link is https://www.youtube.com/watch?v=bh08la7J0_s .
[85]*See* Appellants' Opening Brief, p.1 (Issue 2), p.41.

Officer Tran who was clinging to the outside of the vehicle was not in danger.[86] The fact that Officer Tran was in danger from being an unwilling passenger on the outside of Mr. Terry's vehicle is shown by the video of him rolling in the street and nearly being runover by Mr. Terry's vehicle.[87]

Harmon's and Woods's legal analysis also pursues a case with different facts than the case before the Court.[88] Harmon and Woods extensively brief cases where police officers were standing beside or behind a suspect's vehicle.[89] But these cases are not relevant. It is undisputed that Officer Tran was physically on Mr. Terry's vehicle.[90] In short, the District Court correctly found:

> In this case, viewing the facts in the light most favorable to the plaintiff, and drawing all reasonable inferences in Plaintiffs' favor, the Court finds that Terry's injuries were caused by Tran's use of lethal force, and these facts—if true—were not clearly excessive based on the circumstances. While Terry was unarmed, his actions gave Tran a reasonable apprehension of serious physical harm as a passenger on the fleeing vehicle.[91]

With regard to Mr. Harmon, the District Court further found: "Because the facts alleged clearly establish that Harmon was not the subject of Tran's use of

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[86]*See id*.
[87]*See* Officer Tran's Appellee's Brief and still pictures taken from video, which are incorporated in this brief by reference. *See* FED. R. APP. P. 28(i)).
[88]*See* Appellant's Opening Brief, pp.29-37.
[89]*See id*.
[90]ROA.187, 190. *See* video referenced in Plaintiffs' Amended Complaint, p.2, ¶ 3; *see also* Plaintiffs' Amended Complaint, p.5, ¶¶ 30-32.

force, Harmon fails to allege a violation of his Fourth Amendment right to be free from excessive force under section 1983."[92] Arlington has briefed the bystander issue in its briefing below. The cases from this Court confirm that the District Court's decision regarding Mr. Harmon's claims was correct.

If the Court agrees that no constitutional violation occurred regarding Officer Tran's use of force by shooting Mr. Terry, then Arlington – as Officer Tran's employer – cannot be liable for Harmon's and Woods's claims. Accordingly, the claims against Arlington were properly dismissed for failure to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6); *see also Elizondo v. Green*, 671 F.3d 506, 510-11 (5th Cir. 2012) ("[I]n the absence of a constitutional violation, there can be no municipal liability for the City."); *James v. Harris Cnty.*, 577 F.3d 612, 617 (5th Cir. 2009) ("To hold a municipality liable under § 1983 for the misconduct of an employee, a plaintiff must show, *in addition to a constitutional violation*, that an official policy promulgated by the municipality's policymaker was the moving force behind, or actual cause of, the constitutional injury.") (emphasis added).

[91]ROA.350. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, No. 4:19-cv-00696-O, 2020 WL 6018819, Slip Op. at 8 (N.D. Tex. Aug. 12, 2020).

C. All federal claims against Arlington fail under *Monell*.

Issue 3.

> Whether the Complaint adequately stated a claim for municipal liability against the city, based on the police department's customs of not disciplining the officer for his bad behavior and of using excessive force, in particular against Black men.[93]

Arlington cannot be held liable under § 1983 "unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 691 (1978). "Proof of municipal liability, sufficient to satisfy *Monell* requires: (1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose "moving force" is that policy (or custom). *Pineda v. City of Houston,* 291 F.3d 325, 328 (5th Cir. 2002) (citing *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)). In order to prove a municipal custom, a plaintiff must show:

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

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[92]ROA.354. Slip Op., p.12.
[93]*See id*.

> do not render the municipality liable under § 1983 unless they execute official policy as above defined.

See Pineda, 291 F.3d at 328 (quoting *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc, per curiam)). Mere allegations that an illegal custom exists are not enough; municipal policymakers capable of subjecting a municipality to liability must be chargeable with awareness of the custom. *See Pineda*, 291 F.3d at 330-331.

Harmon and Woods do not allege that an official policy caused their alleged harm.[94] Rather, Harmon and Woods rely on an alleged "custom of using excessive or improper force."[95] Fifth Circuit case law is clear that the "description of a policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory; it must contain specific facts." *Spiller v. City of Texas City*, 130 F.3d 162, 167 (5th Cir. 1997). Conclusory allegations are inadequate to withstand a motion to dismiss. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

1. Harmon and Woods have failed to allege a custom of using excessive force.

[94]ROA.191-197, 200-201, 204. *See* Plaintiffs' Original Complaint, pp.6-12; p.15-16, ¶¶ 132, 134; p.19, ¶¶ 151, 153.
[95]ROA.201. *See id.,* p.15, ¶ 132.

Harmon and Woods rely on a series of alleged "failures" of the Arlington Police Department.[96] Harmon and Woods begin with allegations of a "Traffic Quota Scandal" that – according to their allegations – involved "sixteen APD officers."[97] These allegations are immaterial because they do not involve the use of force or alleged racial bias.[98]

Harmon and Woods next rely on allegations about the handcuffing of a teenager.[99] Harmon and Woods say an "argument broke out" between an officer and the teenager's mother and that, subsequently, the other teenage son was allegedly thrown to the ground, slapped, and handcuffed.[100] Harmon and Woods do not allege that this incident involved the use of deadly force.[101] Harmon and Woods do not allege that Officer Tran was involved in any way.[102]

Harmon and Woods also cite to an incident in March of 2015 involving Jonathan Paul, which occurred in a "jail cell".[103] The allegations indicate the officers used "pepper spray"; however, the allegations do not indicate the use of a

[96]ROA.191-196. *See id*., pp.6-11.
[97]ROA.192. *See id*., p.7, ¶¶ 47-51.
[98]ROA.192. *See id*.
[99]ROA.192-193. *See id*., pp.7-8, ¶¶ 52-60.
[100]ROA.192. *See id.*, p.7, ¶¶ 55-56.
[101]ROA.192-193. *See id*., pp.7-8, ¶¶ 52-60.
[102]ROA.192-193. *See id.*
[103]ROA.193-194. *See id.,* pp.8-9, ¶¶ 64- 69.

taser or firearm.[104] Harmon and Woods state that two of the involved officers, Medina and Schmidt, "retired during the investigation of the incident."[105] Harmon and Woods allege that "[b]oth officers [Medina and Schmidt] were indicted on charges of criminally negligent homicide." Schmidt pleaded guilty to a charge of official oppression; Medina pleaded guilty to a charge of assault causing a bodily injury.[106] Harmon and Woods allege a civil lawsuit was "settled".[107] Harmon and Woods make no allegation that Arlington failed to discipline the named officers or that there was any court finding of wrongful conduct by Arlington.[108]

Harmon and Woods also cite to an incident involving Christian Taylor who, in the words of Harmon and Woods, was "suffering from the effects of marijuana and synthetic drugs and had broken into the [car] dealership."[109] Harmon and Woods admit that Mr. Taylor was ordered to "get down on the ground" and that he "did not comply."[110] According to Harmon and Woods, Mr. Taylor then began "walking" towards Officer Miller after refusing to "comply" with the officer's commands.[111] The one similarity of note is that both Mr. Taylor and Mr. Terry

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[104]ROA.193-194. *See id*.
[105]ROA.193. *See id*. at ¶ 66.
[106]ROA.193. *See id*. at ¶ 68.
[107]ROA.194. *See id*. at ¶ 69.
[108]ROA.193-194. *See id.,* pp.8-9, ¶¶ 64- 69.
[109]ROA.194. *See id*. at p.9, ¶¶ 70-71.
[110]ROA.194. *See id*. at ¶¶ 72 & 74.
[111]ROA.194. *See id*. at ¶ 74.

openly refused to comply with police orders before any force was used.[112] After review of the video that Harmon and Woods incorporated into their live complaint, the District Court observed:

> . . . Tran approached the vehicle on the passenger side and requested that the men lower the windows and shut off the vehicle's engine, to which the men complied. *Id*. at ¶¶ 21, 22. Tran remained by the passenger side of the vehicle while Herlihy temporarily returned to her cruiser. *Id*. at ¶ 28.
>
> Soon after, Terry began rolling up the windows and grabbing for the keys.[2] The video records shows that Tran responded by climbing onto the side of the car, placing his right arm in the passenger window to prevent it from rolling up, and shouting several warnings. Terry then engaged the vehicle's ignition and accelerated the vehicle forward. . . .[113]

Thus, the similarity of note between the two matters is that both Mr. Taylor and Mr. Terry openly refused to obey the officers' commands.

Although Harmon and Woods allege that a civil lawsuit involving Mr. Taylor was "settled", Harmon and Woods make no allegation that Arlington failed

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[112]ROA.189-190, 194. *See id.*, pp.4-5, ¶¶ 22 & 30 ("Tran ordered the men to lower their windows and to shut off the vehicle's engine, to which they complied. . . . Mr. Terry rolled the windows of the SUV upward and started moving forward."), p.9, ¶ 74 ("Taylor did not comply with APD Officer Miller's commands and began walking towards Miller.").

[113]ROA.344. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, 4:19-cv-00696-O, 2020 WL 6018819, No. Slip Op. at p.2 (N.D. Tex. Aug. 12, 2020).

to discipline the officer or that there was any court finding of wrongful conduct by Arlington.[114]

Harmon and Woods cite to an incident involving Tavis Crane, but provide limited factual allegations.[115] Harmon and Woods allege: "APD officers ordered Crane from the vehicle but he refused to exit."[116] Harmon and Woods say: "APD officer Craig Roper and Corporal Elise Bowden then attempted to remove Crane from the vehicle by force and Crane resisted."[117] Harmon and Woods acknowledge the lawsuit "remains active".[118] Harmon's and Woods's version of events indicates that Mr. Crane, like Christian Taylor and Mr. Terry, all involve individuals who refused to comply with police orders.[119] These allegations do nothing to support Harmon's and Woods's alleged claims of racial bias.

[114]ROA.194. *See Plaintiffs' Amended Complaint*, p.9, ¶¶ 70-76.
[115]ROA.194-195. *See id*., p.9-10, ¶¶ 77-84.
[116]ROA.194. *See id*., p.9, ¶ 79.
[117]ROA.194. *See id*., ¶ 80.
[118]ROA.195. *See id*., p.10, ¶ 84.
[119]ROA.189-190, 194. *See* Plaintiffs' Amended Complaint, pp.4-5, ¶¶ 22 & 30 ("Tran ordered the men to lower their windows and to shut off the vehicle's engine, to which they complied. . . . Mr. Terry rolled the windows of the SUV upward and started moving forward."), p.9, ¶ 74 ("Taylor did not comply with APD Officer Miller's commands and began walking towards Miller."), p.9, ¶ 79 ("APD Officers ordered Crane from the vehicle but he refused to exit.").

Harmon and Woods also cite to an incident involving Gabriel Olivas.[120] According to Harmon and Woods, Mr. Olivas was "threatening to kill himself and had doused himself in gasoline."[121] Harmon and Woods do not allege that any firearm was used in the incident; rather, they alleged APD officers used their "tasers" causing him to "catch fire".[122] Harmon and Woods do not allege that Mr. Olivas was black.[123] Once again, the factual allegations do not resemble the case at hand.[124] Moreover – as Harmon and Woods note – the lawsuit "remains active."[125] In fact, the case is currently on appeal before this Court as: *Ramirez, et al v. City of Arlington, et al*, No. 20-10055.

Harmon and Woods make sparse allegations about an incident involving Maggie Brooks.[126] Harmon and Woods allege: "In August of 2019, an APD officer approached Maggie Brooks and her dog as they were laying in the grass."[127] Harmon and Woods then allege the officer asked Ms. Brooks if she was "ok" and she responded, "I'm fine."[128] Harmon and Woods then say "the dog

[120]ROA.195. *See* Plaintiffs' Amended Complaint, p.10, ¶¶ 85-92.
[121]ROA.195. *See id*., p.10, ¶ 86.
[122]ROA.195. *See id*., p.10, ¶¶ 85-92.
[123]ROA.195. *See id*.
[124]ROA.195. *See* Plaintiffs' Amended Complaint, p.10, ¶¶ 85-92.
[125]ROA.195. *See id*. at p.10, ¶ 92.
[126]ROA.195-196. *See id*., pp.10-11, ¶¶ 93-97.
[127]ROA.195. *See id*. at p.10, ¶ 93.
[128]ROA.195. *See id*. at ¶ 94.

approached" the officer, who asked Ms. Brooks "Is that your dog?"[129] Harmon and Woods allege the "officer then drew his firearm and discharged multiple times," killing Ms. Brooks.[130] Plaintiffs do not allege that the officer intended to shoot Ms. Brooks or that Arlington failed to discipline the officer or that Ms. Brooks was a minority.[131]

The incidents alleged by Harmon and Woods fail to show Arlington had a known "custom of using excessive or improper force". The allegations by Harmon and Woods affirmatively show that the cited incidents related to Gabriel Olivas and Maggie Brooks were substantially different from facts of the case at hand.[132] With regard to the Christian Taylor and Tavis Crane incidents, Plaintiffs' own allegations do show similarity to the case at hand in that all three individuals refused police orders before force was used.[133] With regard to Jonathan Paul, Plaintiffs notably omit any allegations of whether he also refused police orders.[134] In sum, Plaintiffs' allegations fail to show that municipal policymakers were

[129]ROA.196. *See id*. at p.11, ¶ 95.
[130]ROA.196. *See id*. at ¶¶ 96-97.
[131]ROA.195-196. *See id*. at pp.10-11, ¶¶ 93-97.
[132]ROA.195-196. *See id.*, pp.10-11, ¶¶ 85-97.
[133]ROA.189-190, 194. *See id*. at pp.4-5, ¶¶ 22 & 30 ("Tran ordered the men to lower their windows and to shut off the vehicle's engine, to which they complied. . . . Mr. Terry rolled the windows of the SUV upward and started moving forward."), p.9, ¶ 74 ("Taylor did not comply with APD Officer Miller's commands and began walking towards Miller."), p.9, ¶ 79 ("APD Officers ordered Crane from the vehicle but he refused to exit.").
[134]ROA 194-194. *See id*. at pp.8-9, ¶¶ 64- 69.

charged with awareness of the alleged customs of using excessive force or of racial bias. *See Pineda*, 291 F.3d at 330-31.

Even if the cited incidents were sufficient to allege a custom, the District Court found, correctly, that Harmon and Woods failed to support an allegation of custom "with a sufficient demonstration that any of the alleged customs were the moving force behind Tran's actions."[135] Rather, Officer Tran was faced with a unique situation where he was forced to make a split second decision while being on a moving vehicle driven by Mr. Terry.

2. Harmon and Woods Failed to State a Failure to Train Claim and Chose Not to Pursue the Dismissal of this Claim on Appeal.

Harmon's and Woods's failure to train claim amounts to nothing more than a few scattered conclusory statements found in their twenty-one page complaint.[136] At paragraph 61 of their complaint, Harmon and Woods say: "APD officers are woefully undertrained in de-escalation processes."[137] Seventy-one paragraphs later, Harmon and Woods include a conclusory reference to "training and disciplinary failures resulting in officers ill-equipped to handle citizen confrontations equipped with firearms and the authority of the law."[138] Harmon

[135]ROA.358. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, 4:19-cv-00696-O, 2020 WL 6018819, No. Slip Op. at p.16 (N.D. Tex. Aug. 12, 2020).
[136]ROA.186-206. *See* Plaintiffs' Amended Complaint, pp.1-21.
[137]ROA.193. *See id*. at p.8, ¶ 61.
[138]ROA.200. *See id.,* p.15, ¶ 132.

and Woods ultimately give a conclusory laundry list of alleged training failures ("lacked proper training on how to confront citizens and what level of force to use, lacked adequate training in de-escalation tactics, lacked adequate training in techniques for detaining individuals in motor vehicles, lacked adequate training on identifying an actual or imminent threat of death or serious bodily injury").[139] The conclusory allegations in paragraphs 132 and 134 are repeated almost verbatim in paragraphs 151 and 153.[140]

Harmon and Woods never make any allegation that Officer Tran had not completed all necessary training to become a licensed peace officer.[141] *See May v. City of Arlington*, 398 F. Supp. 3d 68, 80-81 (N.D. Tex. 2019) (there was not a scintilla or hint of an allegation that Arlington's training of police officers fell below the minimum for a person to become a licensed peace officer in Texas). Likewise, Harmon and Woods never make any allegation that Officer Tran was not a licensed peace officer.[142] With regard to training, Plaintiffs have offered nothing but naked assertions devoid of further factual enhancement. *See Iqbal*, 556 U.S. at

[139]ROA.200-201. *See id*. at p.15-16, ¶ 134.
[140]ROA.204. *See id*. at p.19, ¶¶ 151, 153.
[141]ROA.186-206. *See id*. at pp.1-21.
[142]ROA.186-206. *See id.*, pp.1-21.

678-679. Accordingly, the District Court properly dismissed Harmon's and Woods's failure to train claim.[143]

Even if Harmon and Woods stated a claim for failure to train, they have chosen not to appeal the District Court's dismissal of this claim on appeal.[144] Harmon's and Woods's third issue addresses the issue of *Monell* liability as to Arlington only for the alleged "customs of not disciplining the officer for his bad behavior and of using excessive force, in particular against Black men."[145] The remainder of Harmon's and Woods's brief confirms that they are not appealing the dismissal of the failure to train claim given that they have chosen to provide no briefing on the issue.[146] For example, Harmon's and Woods's Summary of the Argument identifies two *Monell* contentions, but omits a failure to train claim.[147] Arlington acknowledges that Harmon and Woods make a reference to "training failures" on page fifty of their brief; this reference does not change the fact that they have not pursued a failure to train claim on appeal. Accordingly, the District Court's dismissal of the failure to train claim should be affirmed.[148]

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[143]ROA.365. Order.
[144]*See* Appellants' Opening Brief, p.iv (Table of Contents, Section III), p.1 (Statement of Issues Presented, #3), pp.43-58 (argument regarding alleged municipal liability).
[145]*See* Appellants' Opening Brief, p.1 (Statement of Issues Presented, #3).
[146]*See id*., pp.8-10, p.14, pp.43-44.
[147]*See id.*, p.14.
[148]ROA.356-359. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, No. 4:19-cv-00696-O, 2020 WL 6018819, Slip Op. at 2 (N.D. Tex. Aug. 12, 2020).

3. Harmon and Woods Failed to State a Failure to Discipline Claim.

As to discipline, Harmon and Woods make a conclusory reference to "nine instances"; however, Plaintiffs provide absolutely no description of seven of the nine alleged "instances".[149] Specifically, Harmon and Woods allege:

> In the last seven years of his employment with the Arlington Police Department, Tran engaged in nine instances known to the Arlington Police Department that constitute bad acts, bad character and criminal conduct.[150]

There is literally not a single fact alleged about seven of the alleged "instances".[151] As to these seven incidents, they are prime examples of naked assertions devoid of further factual enhancement, which the Supreme Court has declared to be insufficient. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

With regard to the remaining two instances, Harmon and Woods allege that Officer Tran was disciplined for one instance and allege that he was not disciplined for the other.[152] Harmon and Woods also conveniently omit any factual allegation about the conduct of the other individuals involved in the two incidents that are discussed.[153] By omitting the conduct of the other parties to the two incidents, Harmon and Woods are necessarily asking the Court to speculate about whether

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[149]ROA.196-197. *See* Plaintiffs' Amended Complaint, pp.11-12, ¶¶ 104-117.
[150]ROA.196. *See id*., p.11, ¶ 104.
[151]ROA.196-197. *See id.,* pp.11-12, ¶¶ 104-117.
[152]ROA.196-197. *See id*.
[153]ROA.196-197. *See id*.

discipline was appropriate or not and, if so, at what level. Harmon's and Woods's "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," thus, "the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting FED. R. CIV. P. 8(a)(2)). In sum, Harmon and Woods have failed to allege facts showing that they have a plausible claim related to failure to discipline.

4. Harmon and Woods failed to show that any alleged custom was the moving force of any constitutional violation of rights.

Harmon and Woods failed to plead facts describing an unconstitutional custom that was the moving force behind any alleged violations of their civil rights. Harmon and Woods have not pleaded sufficient factual matter to show that Arlington officials adopted a policy or custom which caused their alleged injuries. They have failed to state a claim against Arlington upon which relief can be granted. *See Iqbal*, 556 U.S. at 678-80. The District Court's dismissal of the *Monell* claims against Arlington should be affirmed.

D. Federal law does not recognize a bystander claim under § 1983 by an individual who witnesses police action, but is not the object of that action.

Issue 2.

> Whether the vehicle's passenger was seized by the officer shooting the vehicle's driver, which subsequently stopped the vehicle, such that the passenger can bring a Fourth Amendment excessive force claim.[154]

Mr. Harmon failed to state a cause of action because he was not the alleged object of Officer Tran's use of force, as shown by his own factual allegations.[155] Because federal law does not recognize bystander claims under § 1983, all of Mr. Harmon's claims were properly dismissed with prejudice. *See, e.g., Coon v. Ledbetter*, 780 F.2d 1158, 1160-61 (5th Cir. 1986); *Khansari v. City of Houston*, 14 F. Supp. 3d 842, 861-64 (S.D. Tex. 2014).

1. Mr. Harmon's factual allegations.

Mr. Harmon's factual allegations show that he was a witness to Officer Tran's use of force, but not the object of that action.[156] Mr. Harmon alleges that he was a passenger in Mr. Terry's vehicle when he and Mr. Terry were stopped by Arlington Police Officer Julie Herlihy "after she allegedly observed Terry's

[154]*See* Appellants' Opening Brief, p.1.
[155]ROA.186, 190, & 203-204. *See* Plaintiffs' Amended Complaint, at p.1, ¶ 2, p.5, ¶¶ 31-34, p.18, ¶ 146, p.19, ¶ 150.
[156]ROA.186, 190, & 203-204. *See id*.

temporary registration tag was approximately three days expired."[157] Mr. Harmon alleges that Officer Herlihy detained Mr. Terry and Mr. Harmon "alleging she smelled marijuana emanating from the vehicle."[158] Mr. Harmon alleges that, after being initially detained by Officer Herlihy, Officer Tran "approached Mr. Terry's vehicle from the passenger side."[159] Mr. Harmon further alleges:

> "Tran ordered the men to lower their windows and to shut off the vehicle's engine, to which they complied."[160]
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> "Throughout the entirety of the encounter, Tran was positioned adjacent to the passenger side door of Mr. Terry's vehicle."[161]
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> "Mr. Terry rolled the windows of the SUV upward and started moving forward."[162]
>
> "In an effort to gain a good angle to shoot Mr. Terry, Defendant Tran proceeded to grab onto the passenger window and climb onto the side of the vehicle, reaching for his service weapon with his right hand."[163]
>
> "As Terry's vehicle began to move forward, Tran stuck his gun through the passenger window – mere inches away from the face of Harmon – and fired at least four shots at Terry."[164]
>
> "The bullets struck Terry once in his left thigh and three times in his torso."[165]

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[157]ROA.189. *See id*. at p.4, ¶ 18.
[158]ROA.189. *See id*. at ¶ 20.
[159]ROA.189. *See id*. at ¶¶ 18-21.
[160]ROA.189. *See id*. at ¶ 22.
[161]ROA.190. *See id*. at p.5, ¶ 28.
[162]ROA.190. *See id*. at ¶ 30.
[163]ROA.190. *See id*. at ¶ 31 (underlining added).
[164]ROA.190. *See id*. at ¶ 32 (underlining added).
[165]ROA.190. *See id*. at ¶ 33 (underlining added).

Mr. Harmon never alleges any use of force by Officer Tran was directed at Mr. Harmon or that Officer Tran aimed his firearm at Mr. Harmon.[166] Mr. Harmon had no physical injury.[167] Rather, Mr. Harmon alleges he "suffered extreme and severe mental and emotional distress, agony and anxiety."[168] In sum, Mr. Harmon never alleged that Officer Tran – or any other officer – used excessive force against Mr. Harmon.[169]

2. Comparison to *Khansari v. City of Houston*.

The case of *Khansari v. City of Houston* provides analytical similarities for evaluating Mr. Harmon's claim. *See Khansari v. City of Houston*, 14 F. Supp. 3d 842, 861-64 (S.D. Tex. 2014). Like this case, the *Khansari* decision was rendered on a municipality's motion to dismiss. *Id*. at 848-49. The City of Houston sought a Rule 12(b)(6) dismissal of the federal law claims asserted by Debra and Michael Khansari (the parents of plaintiff Corey Khansari) for "individual and bystander liability". *Id*.

The Khansari plaintiffs alleged that Mr. Khansari called 911 because Mrs. Khansari feared that Corey had attempted suicide through an overdose of medication. *Id*. at 850. An ambulance arrived. *Id*. Corey emphatically informed

[166]ROA.189-191. *See id*. at pp.4-6, ¶¶ 18-42.
[167]ROA.189-191. *See id*.
[168]ROA.190. *See id*. at p.5, ¶ 34.

one of the paramedics that he did not want to go with the paramedics. *Id*. Houston police officers began to arrive. *Id*. The first officer got out of her squad car armed with a long gun and appeared to put a round in the chamber as if preparing to fire. *Id*. Mrs. Khansari asked the officer: "What are you doing?" *Id*. The officer allegedly replied with words to the effect "I might have to kill someone". *Id*. Mrs. Khansari explained that Corey needed to have his stomach pumped and that there were no guns in their home. *Id*.

Plaintiffs alleged several additional officers were also armed with long guns. *Id*. Armed officers yelled at Mr. Khansari in a threatening manner to get out of the way, that he was interfering with police work, and that if he did not get out of the way, he would be arrested. *Id*. Mr. Khansari complied. *Id*. At some point, Corey walked out of the house and was standing in the yard. *Id*. The officers pointed their weapons at Corey, with "[r]ed laser beam dots" appearing on him. *Id*. Corey and his mother feared that the officers were going to shoot Corey. *Id*. Mrs. Khansari, attempting to protect her son, interposed herself between some of the officers and Corey. *Id*. Mrs. Khansari repeated that the Khansaris were unarmed. *Id*. At this time, red laser beam dots appeared on Mrs. Khansari. *Id*. Officers were shouting. *Id*. Fearing that his mother was in danger, Corey pushed Mrs. Khansari "out of the line of fire." *Id*. Immediately, an officer fired a taser at

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[169]ROA.189-191. *See id*. at pp.4-6, ¶¶ 18-42.

Corey, which struck Corey in the head; one of the taser darts pierced Corey's eye. *Id*. Plaintiffs alleged that Mrs. Khansari was "within feet of her son when he was shot by taser guns." *Id*. at 862.

Plaintiffs alleged that Corey received an electrical charge from the taser and fell to his knees and was disoriented. *Id*. at 850. He tried to get up, and received additional electrical charges. *Id*. Witnessing this, Mr. Khansari "felt extreme anxiety and fell to the ground, feeling like he was having a heart attack." *Id*. at 850-51. Paramedics rushed to Mr. Khansari and took him into the ambulance. *Id*. at 851. Corey retreated to the interior of the home and pulled the taser dart from his eye. *Id*. Mrs. Khansari called Corey on the phone; Corey told a fireman that he would come out with his hands over his head. *Id.* When Corey emerged, a police officer kicked Corey to the ground. *Id*. Corey was then taken to a hospital for treatment. *Id*. Corey was never charged with a crime and did not have a weapon at any time during the incident. *Id*. Mrs. Khansari alleged she was "herself a subject of the Officers' conduct, being pointed at with guns, being grabbed by the neck or shoulder, and being told threatening statements." *Id*. at 862. "She was within feet of her son when he was shot by taser guns." *Id*. Mrs. Khansari "suffered shock as a result of the direct emotional impact upon her from the Officers actions directed specifically at her and from her contemporaneous observance of the events." *Id*.

The District Court found that the facts alleged were not sufficient to state a section 1983 claim arising from "force used against or witnessed by Corey's parents, Debra and Michael Khansari". *Id*. at 861. The District Court found that "drawing and pointing weapons and shouting at Mr. and Mrs. Khansari are subject to dismissal for failure to state a claim because plaintiffs have not alleged facts capable of showing that the police actions were directed at Mr. or Mrs. Khansari or that Mr. or Mrs. Khansari suffered a seizure as required for a violation of rights protected by the Fourth Amendment." *Id*. at 862. Neither Mr. or Mrs. Khansari "alleged facts capable of establishing that either Mr. or Mrs. Khansari suffered an injury that was more than de minimis due to any of the acts about which they complain." *Id*. "Instead, plaintiffs merely allege[d] that 'Mr. and Mrs. Khansari have suffered and continue to suffer extreme emotional distress as a result of the conduct of the Defendants." *Id*. at 862-863. "Plaintiffs allege no facts capable of establishing that either Mr. or Mrs. Khansari suffered physical injuries from police actions directed at them and not at Corey." *Id*. at 863. Mr. Harmon's allegations also fall short. Unlike Mrs. Khansari, Mr. Harmon never alleges that Officer Tran aimed a firearm at Mr. Harmon.[170]

[170]ROA.186-206. *See* Plaintiffs' Amended Complaint, pp.1-21.

The District Court expressly rejected the Khansaris' reliance on *Petta v. Rivera*, 143 F.3d 895, 900-901 (5th Cir. 1998) (per curiam), saying:

> Petta involved an officer's use of excessive force against a mother and two young children in a car with her during an investigatory traffic stop. The evidence showed that the children were more than bystanders to the use of force against their mother. The officer's actions included screaming, banging on the car, shooting at the car, breaking windows, and other acts that the children not only watched their mother experience, but also experienced themselves. The evidence included the children's own continued and severe psychological injuries as a result of actions directed not only towards their mother, but towards the car that they, too, occupied. Id. at 902-03. Petta does not support the argument that Mr. and Mrs. Khansari are able to assert § 1983 claims against the defendant officers.

Id. at 863 (citing *Petta*, 143 F.3d at 902-903). *Petta* is discussed in more detail in the next section.

"A civil rights claim must be based upon a violation of a plaintiff's personal rights secured by the Constitution, and a bystander who is not the object of police action cannot recover for the resulting emotional injuries under § 1983." *Id*. at 863 (*citing Grandstaff v. City of Borger, Texas*, 767 F.2d 161, 172 (5th Cir. 1985); *Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986)). "There is no constitutional right to be free from witnessing police action". *Id*. at 863-864 (citing *Young v. Green*, 2012 U.S. Dist. Lexis 115027, *12, 2012 WL 3527040, *4 (S.D. Tex. Aug. 15, 2012)). In sum, the claims of Mr. and Mrs. Khansari were dismissed because the alleged facts show that their claims were only for "emotional distress

arising from witnessing police action against their son, Corey". *Id*. at 864. The same exact reasoning applies to Mr. Harmon's claims in the case at hand.

3. Contrast with *Petta v. Rivera*.

Although *Petta v. Rivera* is distinguishable from the facts of this case, it is still a case that needs to be considered in the analysis. 143 F.3d 895 (5th Cir. 1998) (per curiam).[171] A Texas Department of Public Safety patrol officer stopped Melinda Petta for speeding. *Id*. at 897. Ms. Petta's two children, age three and seven, were in the car with her. *Id*. Ms. Petta and the officer argued over her speed. *Id*. The officer ordered Ms. Petta out of the vehicle; Ms. Petta refused and rolled her window up. *Id*. The officer allegedly "lost his temper, becoming agitated, irrational, threatening and verbally and physically abusive." *Id*. The officer threatened to have the car towed. *Id*.

When Ms. Petta still refused to exit, the officer allegedly "began screaming and cursing her, tried to jerk her door open, and attempted to smash her driver's side window with his nightstick." *Id*. The "tirade culminated when Rivera menaced her with his .357 Magnum handgun." *Id*. Ms. Petta panicked and fled the scene. *Id*. at 897-98. The officer allegedly "fired a shot at her car as she drove away." *Id*. at 898. A nineteen-mile, high speed pursuit through Corpus Christi

[171]Because the case was appealed from summary judgment, the disputed facts were viewed in the light most favorable to Petta. *Petta*, 143 F.3d at 897.

ensued, which also involved other officers. *Id*. During the chase, the officer "again shot at her vehicle, attempting to blow out her tires." *Id*. The record showed that the officer's "superiors ordered him not to fire at the fleeing car and that [the officer] disregarded those orders." *Id*. The pursuit ended when Ms. Petta was arrested at her apartment. *Id*. Ms. Petta's children were not touched by any officers. *Id*.

The Petta children claimed that the officer's "abusive behavior and use of excessive force during the initial stop and ensuing chase caused them severe emotional harm", depriving them of their liberty. *Id*. at 900. The Fifth Circuit held that the Petta children "asserted a valid claim under § 1983 for a constitutional violation for excessive force under the Fourteenth Amendment." *Id*. The Fifth Circuit focused on the fact that the "only action necessary under the circumstances was the issuance of a traffic ticket." *Id*. at 902. The officer had "no reason to suspect that Ms. Petta had committed or was about to commit any offense more serious than a minor traffic violation." *Id*. For example, the officer did not smell marijuana in Ms. Petta's car. *See id*. at 897-898, 902. But this scenario differs from the case at hand based on the Plaintiffs' own allegations, which say: "Officer Herlihy continued to detain the two men alleging she smelled marijuana emanating

from the vehicle."[172] The video that Plaintiffs cite to and provide a link for in their live Complaint shows O'Shae Terry admitting to Officer Herlihy that he and Terrence Harmon had been smoking marijuana in the vehicle (time stamp 20:13 to 20:53).[173]

The Fifth Circuit also focused on how the officer's force was directed. *Id*. at 902. Most importantly, some of the officer's use of "lethal and other violent force" was directed at the Petta children. *Id*. The officer shot at the vehicle with the children inside as it left the site of the traffic stop. *Id*. at 897-898. The officer engaged in a high speed pursuit of the vehicle with the Petta children in the car, including shooting at the vehicle again in an attempt to blow out the tires. *Id*. at 898, 902. The officer threatened to have the car towed "with the Pettas inside". *Id*. at 902. In sum, the officer used deadly force directed at Ms. Petta and the Petta children with "utter disregard for the safety and well being of Ms. Petta and her young children". *Id.* at 903. Thus, on the facts of *Petta*, the Fifth Circuit found that the officer's actions were directed at the Petta Children. *See id*. at 900-903.

Harmon's and Woods's allegations show important distinctions with *Petta*.[174] First, the Plaintiffs' allegations do not allege that Officer Tran fired at the vehicle; rather – in Plaintiffs' own words – Officer "Tran stuck his gun through the

[172]*See* ROA.189. Plaintiffs' Amended Complaint, p.4, ¶ 20.
[173]*See* ROA.187. *See id.*, p.2, ¶ 3.

passenger window – mere inches away from the face of Harmon – and fired at least four shots at Terry."[175] Hamon's and Woods's own allegations are clear that (1) Officer Tran fired directly at Mr. Terry, and (2) Mr. Terry was the sole object of Officer Tran's use of force.[176] Further, no high speed police chase was involved with an attempt to shoot out the tires of the vehicle.[177] Moreover, as the District Court found, Officer Tran's use of force against Mr. Terry was justified because Mr. Terry (against Officer Tran's orders) began to drive away while Officer Tran was on the vehicle.[178] Thus, Mr. Harmon's claims are distinguishable from the claims of the Petta children.

4. Discussion of *Coon v. Ledbetter*.

The analysis of *Coon v. Ledbetter* distinguishes a bystander who is the object of police action from one who is not; the case involved two bystanders in different locations. *Coon v. Ledbetter*, 780 F.2d 1158, 1160-1161 (5th Cir. 1986). After leaving a tavern fight and a subsequent hit-and-run accident, Billy Coon was near his trailer home when a group of men approached him. *Id*. at 1159. The men were sheriff's deputies. *Id*. But Billy may not have recognized the deputies

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[174]ROA.189-191. Plaintiffs' Amended Complaint, pp.4-6, ¶¶ 18-42 (PageID 183-185).
[175]*See* ROA.190. Id. at p.5, ¶ 32 (PageID 184) (underlining added).
[176]ROA.190. *See id*.
[177]*See* ROA.189-191. *Id.* at pp.4-6, ¶¶ 18-42 (PageID 183-85).
[178]ROA.350-352. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, No. 4:19-cv-00696-O, 2020 WL 6018819, Slip Op. at 8-10 (N.D. Tex. Aug. 12, 2020).

because it was dark and no squad car lights were activated. *Id*. Also, threats had been made at the tavern that his opponent in the fight would get him later and knew where he lived. *Id*.

A deputy called out to Billy that he wanted to talk. *Id*. Seeing the men approach, Billy went to his trailer and armed himself with a shotgun. *Id*. Another deputy called out that Billy had a gun. *Id*. Billy fired at least two shots, which he claimed were warning shots fired into the air. *Id*. The deputies said the shots were fired in their general direction. *Id*. Billy hollered at the men to "get off my place" and "ran around the front of his trailer" where he was shot by one of the officers; he struggled to get the inside of his trailer. *Id.* at 1159-1160. At least one deputy "fired into the trailer" with a "heavy buckshot". *Id*. at 1160-1161. Although Billy's wife (Dana) was with the deputies outside of the trailer, the Coons' four-year-old daughter (Racheal) was inside the trailer when the deputy fired into the trailer. *Id*. at 1159-1161.

The jury awarded damages to Billy, Dana, and Racheal. *Id*. at 1160. With regards to the claims of Dana and Racheal, the Fifth Circuit began its analysis by noting that "all persons who claim a deprivation of constitutional rights [are] required to prove some violation of their personal rights." *Id*. The Fifth Circuit held that Dana did not meet the required standard. *Id*. at 1160-1161. "There was no evidence that any act of the deputies was directed toward Dana; she was not

directly involved in the shooting and was with the deputies when it occurred." *Id*. at 1161. With regards to Racheal, the Fifth Circuit held that the jury "could have concluded that the deputies knew or should have known that other persons besides Billy Dan Coon were in the trailer, so that the requisite level of reckless conduct . . . was met." *Id*. at 1161. Thus, the Fifth Circuit held that Racheal was able to show the requisite personal loss required for a constitutional claim. *Id*. at 1160-61. Like *Petta*, the Fifth Circuit focused on the child, Racheal, being in the trailer home at the time the deputy fired into the trailer. *Id*. at 1159-1161. Racheal was in the line of fire. *See id*. These facts are distinguishable from the case at hand because the Plaintiffs' factual allegations show Mr. Harmon was never in the line of fire.[179]

5. Discussion of *Grandstaff v. Borger*.

In *Grandstaff v. Borger*, police officers mistook James Grandstaff for a fugitive and killed him. 767 F.2d 161, 164 (5th Cir. 1985). Shortly after 4:00 a.m., the officers pursued a suspect to a ranch where James Grandstaff worked as a foreman and lived with his family. *Id*. at 165. After being awakened by the disturbance and seeing the flashing lights, Mr. Grandstaff approached the officers to investigate. *Id*. As his pickup reached the patrol cars, the officers opened fire,

[179]*See* ROA.186, 190, 203-204. Plaintiffs' Amended Complaint, p.1, ¶ 2, p.5, ¶¶ 31-34, p.18, ¶ 146, p.19, ¶ 150.

killing him. *Id*. Mr. Grandstaff's widow and two stepsons witnessed the shooting. *Id*. at 172.

With regard to the widow and stepsons, the Fifth Circuit held the "bystanders" failed to prove "an independent cause of action under § 1983." *Id*. The Fifth Circuit explained "there is no constitutional right to be free from witnessing this police action." *Id*. Thus, the bystanders could not recover damages under § 1983 for "their own emotional injuries suffered as bystanders when they witnessed the gunfire directed at Grandstaff". *Id*.

Like Mr. Harmon in the case at hand, the widow and stepsons were never the object of police action and were never in the line of fire. *See id*. at 165, 172. The fact that Mr. Harmon was in close proximity does not change the fact that the shots were fired "at Terry."[180] Like Mr. Grandstaff's family, Mr. Harmon was a witness of police action. Because Mr. Harmon has no constitutional right "to be free from witnessing" police action, he has failed to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6).

6. Discussion of *Young v. Green*.

In *Young v. Green*, the district court found: "*Petta* does not support the argument that a witness who merely observes the alleged use of excessive force

[180] *See* ROA.190. Plaintiffs' Amended Complaint, p.5, ¶ 32.

against another has a right to recover damages for what was witnessed." *Young v. Green*, No. H-11-1592, 2012 U.S. Dist. Lexis 115027, at *13, 2012 WL 3527040 (S.D. Tex. Aug. 15, 2012). The plaintiffs alleged that a police officer "used excessive force against Michael Young and that the other plaintiffs witnessed the use of force." *Id*. at *1-*2. The plaintiffs were participants in a midnight sale of athletic shoes, where the officer was working crowd control. *Id*. at *3. The officer allegedly hit Young in the head with a nightstick. *Id*. When two of the other bystander plaintiffs attempted to intervene, the officer allegedly grabbed one of the plaintiff's throat "momentarily" and pushed the other in the chest. *Id*. The bystander plaintiffs alleged that "they suffered mental distress by witnessing the use of force against Michael Young." *Id*. at *3-4. The district court found that the "cases fail to provide support" for a federal bystander claim for witnessing police action. *Id*. at *13. Although the officer allegedly had some contact with two of bystander plaintiffs who intervened, their claims were dismissed. *Id*. at *1-*4, *11-*13.

7. Mr. Harmon never raised the argument in the District Court that, by shooting the driver, Officer Tran was endangering Mr. Harmon.

In order to attempt to salvage his bystander claim, Mr. Harmon raised a new argument on appeal that was never raised in the District Court. This new argument is seen in Harmon's and Woods's second issue, which is stated as follows:

> Whether the vehicle's passenger was seized by the officer shooting the vehicle's driver, which subsequently stopped the vehicle, such that a passenger can bring a Fourth Amendment excessive force claim.[181]

This argument was not raised in Harmon's and Woods's live complaint.[182] The closest Harmon and Woods come in their complaint is a sentence in the statement of facts that alleges: "After being struck by several bullets, Terry lost control of the vehicle which careened forward into traffic before veering off the road and onto an adjacent sidewalk."[183] However, Harmon and Woods never asserted, in the District Court, that this was the factual basis for Harmon's claims of excessive force against Arlington.[184] The District Court expressly noted that Harmon did not raise this argument, saying:

> Plaintiffs do not allege that Tran's actions were directed at Terry's car generally. Rather, the facts in the complaint clearly show that Harmon was a bystander to a use of force which was directed exclusively at Terry.[185]

Accordingly, the District Court did not address Harmon's new argument.[186]

In the District Court, Harmon consistently complained only about the proximity of Officer Tran's firearm to Harmon's face at the time the shots were

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[181]*See* Appellants' Opening Brief, p.1, Issue 2.
[182]ROA.186-206. *See* Plaintiffs' Amended Complaint.
[183]ROA.190. *See id*., p.5, ¶35.
[184]ROA.186-206. *See id*.
[185]ROA.354. *See* Order, p.12.
[186]ROA.352-355. *See* Order, pp.10-13.

fired.[187] Harmon unequivocally framed his complaint below as: "Officer Tran fired his gun across the face of Terrence Harmon and struck and killed O'Shae Terry."[188] Likewise, Harmon unequivocally stated his claim as follows:

> Plaintiff would show that Defendant Tran failed to act as an objectively reasonable officer would have acted in the same or similar circumstances. That is, Defendant Tran, without legal or necessary justification or the need to do so, used excessive and deadly force as described above by pointing his firearm across Harmon's face and discharging it, killing Terry.[189]

The law, as stated by this Court and the Supreme Court, is clear that issues must generally be raised in the District Court in order to be raised on appeal. For example, the Supreme Court explained: "Ordinarily an appellate court does not give consideration to issues not raised below." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). Likewise, the Court has held: "We will not consider an issue that a party fails to raise in the district court, absent extraordinary circumstances." *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916 (5th Cir. 1996). "Extraordinary circumstances exist when the issue involved is a pure question of law and a miscarriage of justice would result from our failure to consider it." *Id*. "Under this Circuit's general rule, arguments not raised before the district court are

[187]ROA.186, 190, 203-204. *See* Plaintiffs' Amended Complaint, p.1, ¶ 2, p.5, ¶¶ 31-34, p.18, ¶ 146, p.19, ¶ 150.
[188]ROA.186. *See id*., p.1, ¶ 2.
[189]ROA.203. *See id*., p.18, ¶ 146.

waived and will not be considered on appeal unless the party can demonstrate 'extraordinary circumstances.'" *AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009) (*citing North Alamo Water Supply Corp*., 90 F.3d at 916.); *see also Watson v. Aurora Loan Servs*., 579 Fed. Appx. 272, 274 (5th Cir. 2014) (per curiam) (same). No extraordinary circumstances exist here. If Harmon and Woods were allowed to present new arguments on appeal, Arlington would be prejudiced because it did have the chance to challenge these arguments in the District Court. Accordingly, the District Courts dismissal of Harmon's claims should be affirmed.

Even if Mr. Harmon's new arguments were considered by the Court, Mr. Harmon has done nothing more than attempt to transmogrify a bystander claim into something else. The attempt failed. Mr. Harmon's live complaint repeatedly emphasizes that his complaint was the proximity of Officer Tran's firearm to Mr. Harmon at the time the shots were fired.[190] The same allegations also make it clear that Officer Tran only targeted Mr. Terry.[191] Moreover, it was Mr. Terry, and not Officer Tran, who decided to restart his vehicle and begin driving away while Officer Tran was on the running board. Officer Tran did not cause the vehicle to

[190] *See id*.
[191] *See id*.

move forward; rather, he had ordered Mr. Terry to turn the vehicle off and roll down the windows, to which Mr. Terry initially complied.[192]

In addition, there are circuit court cases where the officer accidentally shot a bystander and, nevertheless, the bystander did not have a claim because the bystander was not the object of the use of force. *See Landol-Rivera v. Cosme*, 906 F.2d 791, 798 (1st Cir. 2009) ("we hold that no Fourth Amendment seizure occurred when plaintiff was shot inadvertently during a police pursuit of the robbery suspect who was holding him hostage"); *Medeiros v. O'Connell*, 150 F.3d 164, 170 (2nd Cir. 1998) ("The conduct of the troopers was not merely constitutionally acceptable, it was objectively admirable."). Thus, Mr. Harmon's argument that he should be allowed to pursue an excessive force case for being in a vehicle when the driver was shot does not follow. If there is no cause of action for a bystander in a vehicle who was hit by gunfire, there can be no cause of action for a bystander in a vehicle for incidental harm, such as a vehicle crash.

Regardless of Mr. Harmon's attempt at a new argument, the factual allegations of his live complaint show that he has only stated a bystander claim, for which there is no remedy.

[192]ROA.189. Plaintiffs' amended Complaint, p.4, ¶ 22.

8. Conclusion regarding bystander claims.

Mr. Harmon has failed to allege a deprivation of his own constitutional rights.[193] As outlined above, Plaintiffs included detailed factual allegations showing that Officer Tran never aimed his firearm at anyone other than Mr. Terry.[194] Moreover, Mr. Harmon did not suffer any physical injuries, including minor injuries.[195] Mr. Harmon was not the object of the complained-of use of force by Officer Tran.[196] "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Mr. Harmon's claims fail to meet this standard. Accordingly, the District Court's dismissal of Mr. Harmon's claims should be affirmed.

E. The amicus brief by the Cato Institute provides nothing new other than a generic dislike of qualified immunity, which has been well-established by the U.S. Supreme Court.

The amicus brief by the Cato Institute seems to have two functions.[197] The first is to reiterate that the Cato Institute does not like the doctrine of qualified immunity.[198] The Cato Institute styles this section of its brief as: "The Doctrine Of Qualified Immunity Is Untethered From Any Statutory Or Historical

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[193]ROA.186, 190, 203-204. *Id*. at p.1, ¶ 2, p.5, ¶¶ 31-34, p.18, ¶ 146, p.19, ¶ 150.
[194]ROA.186, 190, 203-204. *See id*.
[195]ROA.190, 203. *See id*. at p. 5, ¶ 34, p.18, ¶ 148.
[196]ROA.186, 190, 203-204. *See id*. at p.1, ¶ 2, p.5, ¶¶ 31-34, p.18, ¶ 146, p.19, ¶ 150.
[197]*See* Brief of the Cato Institute as *Amicus Curiae* in Support of Plaintiffs-Appellants.
[198]*See id*. at pp.4-13.

Justification."[199] Whether the Cato Institute approves or disapproves of the doctrine is irrelevant. The doctrine of qualified immunity has been well-established for decades by the U.S. Supreme Court. *See, generally, Pearson v. Callahan*, 555 U.S. 223, 231-232 (2009); *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982). The Cato Institute needs to direct its complaints to the Supreme Court, which is the only Court empowered to change the doctrine.[200] The abolition of the doctrine of qualified immunity cannot be accomplished in this or any other Circuit Court of Appeals.

Second, the Cato Institute generally applauds the arguments by Harmon and Woods.[201] The Cato Institute's opinions are not relevant to this Court's legal determination of the issues. To the extent the Cato Institute restates the arguments by Harmon and Woods,[202] those contentions have been fully addressed above and by the District Court in its order dismissing all claims.[203]

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[199]*See id*. at p.4

[200]The Cato Institute "recognizes, of course, that this Court is obligated to follow Supreme Court precedent with direct application, whether or not that precedent is well reasoned …". *See id*. at p.2.

[201]*See* Brief of the Cato Institute as *Amicus Curiae* in Support of Plaintiffs-Appellants, pp.13-17.

[202]*See id.*

[203]ROA.344-364. *Harmon v. City of Arlington*, 478 F.Supp.3d 561, No. 4:19-cv-00696-O, 2020 WL 6018819, Slip Op. at 2 (N.D. Tex. Aug. 12, 2020).

V.
CONCLUSION

The District Court's judgment[204] dismissing the claims against the City of Arlington should be affirmed.

Respectfully Submitted,

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[204]ROA.365. *See* Order.

CERTIFICATE OF SERVICE

I served a true and correct copy of the Brief of City of Arlington, Defendant-Appellee on Plaintiffs – Appellants on February 5, 2021 by filing it with the Court's electronic filing system, as authorized by FED. R. APP. P. 25(c) & (d), as follows:

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