IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

TERRENCE HARMON et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 4:19-cv-00696-O**
	§	
CITY OF ARLINGTON, TEXAS et al.,	§	
	§	
Defendants.	§	

ORDER

Before the Court are Defendant City of Arlington's Motion and Brief to Dismiss (ECF No. 29), filed December 9, 2019; Plaintiffs' Response to Defendant City of Arlington's Motion and Brief to Dismiss (ECF No. 30); Defendant City of Arlington's Reply opposing Plaintiffs' Response to Motion to Dismiss (ECF No. 31); Defendant Bau Tran's Motion and Brief to Dismiss (ECF No. 32), filed January 8, 2020; Plaintiffs' Response to Defendant Bau Tran's Motion and Brief to Dismiss (ECF No. 35); and Defendant Bau Tran's Reply opposing Plaintiffs' Response to Motion to Dismiss (ECF No. 36).

Having considered the motions, briefings, and applicable law, for the reasons that follow, the Court finds that Defendant City of Arlington's motion should be and is hereby **GRANTED**, and that Defendant Bau Tran's motion should be and is hereby **GRANTED**.

I. BACKGROUND[1]

[1] For purposes of this Order, the following facts alleged by Plaintiffs are taken as if they are true. *See Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007) (In reviewing a Rule 12(b)(6) motion, "[t]he [C]ourt accepts all well-pleaded facts as true, view them in the light most favorable to the plaintiff.").

On September 1, 2018 Arlington Police Officer Julie Herlihy ("Herlihy") stopped Plaintiffs O'Shae Terry ("Terry") and Terrence Harmon ("Harmon") due to an expired registration on Terry's vehicle. Am. Compl. ¶ 18, ECF No. 26. After retrieving Harmon and Terry's identification and verifying their identities, Herlihy continued to detain because she suspected that they possessed marijuana in their vehicle. *Id*. at ¶¶ 19, 20. A second Officer, Defendant Bau Tran ("Tran"), soon arrived on the scene to assist. *Id*. at ¶ 21. 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 record 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. Tran responded by removing his right arm from the window, grabbing his pistol from its holster, and firing several shots across Harmon, striking Terry four times. Am. Compl. ¶ 33, ECF No. 26. The video then shows Tran falling off the vehicle and rolling several times, as the vehicle careens away out of control and off the street.

Harmon eventually stopped the vehicle by grabbing the steering wheel and using his hands to remove Terry's foot from the gas pedal. Am. Compl. ¶¶ 36, 37, ECF No. 26. Harmon exited the vehicle and removed Terry, who was bleeding profusely, from the driver side in an attempt to

[2] Although all 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=bh08la7J0_s]). There are several points of material fact on which the video clearly contradicts Plaintiffs' alleged facts. On these facts the video will control.

render aid. *Id*. at ¶ 38. Officers soon arrived, placing Harmon under arrest and transferring Terry to Medical City Arlington Hospital, where he later died. *Id*. at ¶¶ 39, 40.

Administratrix Woods claims relief on Terry's behalf under 42 U.S.C § 1983, asserting first that Tran violated Terry's Fourth Amendment rights by using excessive force during the arrest, and second that the City of Arlington is liable under a theory of municipal liability. Am. Compl. ¶ 128, 136. Administratrix Woods also brings state law claims on behalf of Terry and against Tran for assault and battery as well as punitive and exemplary damages. *Id*. at ¶ 139, 143.

Harmon independently claims relief under 42 U.S.C § 1983, asserting first that Tran violated his Fourth Amendment rights by using excessive force during the arrest, and second that the City of Arlington is liable under a theory of municipal liability. Am. Compl. ¶ 147, 154. Harmon also brings state law claims against Tran for assault as well as punitive and exemplary damages. *Id*. at ¶ 157, 161.

II. LEGAL STANDARD

A. Motion to Dismiss

Federal Rule of Civil Procedure 8(a) requires a plaintiff's pleading to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). If a plaintiff fails to satisfy Rule 8(a), the defendant may file a motion to dismiss the plaintiff's claims under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6).

To defeat a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "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." *Id.* (quoting *Twombly*, 550 U.S. at 556). "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.* (quoting *Twombly*, 550 U.S. at 557).

In reviewing a Rule 12(b)(6) motion, the Court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier*, 509 F.3d at 675. The Court is not bound to accept legal conclusions as true, and only a complaint that states a plausible claim for relief survives a motion to dismiss. *Iqbal*, 556 U.S. at 678–79. "When there are well-pleaded factual allegations, [the] [C]ourt should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. "Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (citations and internal quotation marks omitted).

B. Qualified Immunity

The doctrine of qualified immunity protects government officials sued pursuant to 42 U.S.C. § 1983 "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id*. This doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Courts generally apply the two-pronged analysis established in *Saucier v. Katz* in determining whether a government official is entitled to qualified immunity for an alleged constitutional violation. 533 U.S. 194 (2001). The first prong of the *Saucier* analysis asks whether the facts alleged or shown are sufficient to make out a violation of a constitutional or federal statutory right. 533 U.S. at 201. If the record sets out or establishes no violation, no further inquiry is necessary. *Id.* On the other hand, if a plaintiff sufficiently pleads or establishes the violation of a constitutional or federal statutory right, a court then asks whether the right was clearly established at the time of the government official's alleged misconduct. *Id*. If there are sufficient allegations or evidence to support the violation of a constitutional right, the court asks whether, nevertheless, qualified immunity is appropriate because defendant's actions were objectively reasonable "in light of clearly established law at the time of the conduct in question." *Hampton Co. Nat'l Sur., L.L.C. v. Tunica County, Miss.*, 543 F.3d 221, 225 (5th Cir. 2008) (citation omitted).

The Supreme Court has clarified that it is no longer mandatory for courts to consider the two prongs set in *Saucier* in order but noted that it may be beneficial to do so. *Pearson*, 555 U.S. at 236. Under *Pearson*, courts are now "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id*.

III. ANALYSIS

A. Qualified Immunity

1. The Violation of a Constitutional Right

It is a violation of the Fourth Amendment for an officer to use excessive or unreasonable force in the context of an arrest. *See Graham v. Connor*, 490 U.S. 386, 394 (1987). "To prevail on an excessive force claim, a plaintiff must establish: '(1) injury (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable.'" *Freeman v. Gore*, 483 F.3d 404, 416 (5th Cir. 2007) (quoting *Tarver v. City of Edna*, 410 F.3d 745, 751 (5th Cir. 2005)). Unreasonableness and excessiveness are viewed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396 (citing *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968)). The ultimate inquiry is whether the force used was justified by the acts that led the officer to take action. *See Manis v. Lawson*, 585 F.3d 839, 845 (5th Cir. 2009).

a. Administratrix Woods has Established a Violation of Terry's Fourth Amendment Rights

i. Terry was Injured

Terry was injured when Tran shot him four times, leading to his death. Am. Compl. ¶¶ 33–40, ECF No. 26. Accordingly, this element is satisfied.

ii. Terry's Injury Resulted from a Use of Force Clearly Excessive to the Need

Lethal force is excessive and unreasonable where "the suspect poses no immediate threat to the officer and no threat to others," although it may be justified "where the officer has probable cause to believe the suspect poses a threat of serious physical harm . . . to the officer or to others." *Tenn. v. Garner*, 471 U.S. 1, 11 (1985). In *Garner*, police ordered a fleeing burglary suspect to stop. *Id*. at 3–4. When he tried to climb a fence and escape instead, they shot him in the back of

the head, despite being reasonably certain that he was unarmed. *Id*. "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Id*. at 11.

The Fifth Circuit has held that "a suspect that is fleeing in a motor vehicle is not so inherently dangerous that an officer's use of deadly force is *per se* reasonable." *Lytle v. Bexar County, Tex.*, 560 F.3d 404, 416 (5th Cir. 2009). Rather, the reasonableness of using deadly force on a suspect fleeing in a vehicle depends on the facts and circumstances of the case, and the relative danger posed by the suspect to the officer or to others. *See id*. In *Lytle*, an officer fired his weapon into the back of a fleeing vehicle after pursuing the vehicle for less than half of a mile, despite there being no bystanders or other pedestrians in the immediate vicinity of the chase. *Id*. The Fifth Circuit declined to grant the officer qualified immunity as a matter of law, finding that—given the short duration of the chase and the lack of immediately endangered bystanders—"[a] rational jury could conclude that the [suspect] did not pose an especially significant threat of harm such that the use of deadly force was justified." *Id*. at 417.

Other precedents address the use of deadly force when officer safety is endangered by a suspect's motor vehicle. In *Goldston v. Anderson* an officer used deadly force against an uncooperative suspect who was backing up his vehicle in the direction of the officer's partner in an apparent attempt to flee. 775 F. App'x 772, 773 (5th Cir. 2019). The Fifth Circuit upheld qualified immunity on the grounds that the officer reasonably foresaw a threat of serious harm to his partner, who was in the path of the suspect's vehicle. *Id*. And in *Woolery v. City of Mineral Wells*, an officer grabbed a fleeing vehicle and was dragged from the bumper at a high speed before pulling himself up, issuing several warnings, firing warning shots, and finally administering deadly force. No. 4:04-CV-415-A, 2005 U.S. Dist. LEXIS 5458, at *6–7 (N.D. Tex. Apr. 1, 2005). Another court in this district found that the use of deadly force was not excessive, given the

officer's reasonable apprehension of serious physical harm as an unwilling passenger on the exterior of a fleeing vehicle. *Id.* at *17.

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.

Though neither Tran nor his partner were in the immediate forward path of the vehicle as occurred in *Goldston*, still Tran was at and on the side of Terry's vehicle, subjecting him to an increased risk of danger of serious bodily injury or death. 775 F. App'x at 773. And *Woolery* presents similar facts of an officer pulled unwillingly on the exterior of a fleeing vehicle; the officer in *Woolery* clung to the vehicle as the suspect sped away and swerved several times in an attempt to shake the officer, firing several warning shots before deploying deadly force. 2005 U.S. Dist. LEXIS 5458, at *6–7. While Terry's vehicle only moved a matter of yards before Tran deployed deadly force, he was in reasonable apprehension of imminent harm such that as he attempted to flee he put Tran in harm's way. On the facts presented, Tran's actions were not clearly excessive.

Finally, while Tran had adequate reason to suspect that Terry was driving under the influence of marijuana, deadly force is not *per se* justified because of this. However, this fact—that Terry was driving under the influence—only adds to Tran's apprehension of imminent harm and subsequent response. Given these facts, Tran's use of deadly force was not clearly excessive considering the relative threat that Terry posed to Tran.

iii. Tran's Use of Lethal Force was Reasonable

In determining reasonableness, the Court first considers the severity of the crime at issue. Terry and Harmon were subject to a search on the suspicion that they possessed marijuana. As Plaintiffs correctly note, possession of marijuana is a misdemeanor, as is driving while intoxicated.[3] Terry's actions in attempting to flee are further consistent with evading arrest, and potentially driving while intoxicated. As established in the previous section, under the precedents of *Lytle* and *Zoss*, this Court cannot sanction deadly force as a de facto reasonable response to either of these offenses, standing alone. Still, this fact goes to Tran's apprehension of imminent harm and his subsequent response.

Next, the Court must consider whether the suspect posed an immediate threat to the safety of officers or others. Officer Tran was on the side of the vehicle as it sped away without regard for his safety. Additionally, Tran used several verbal warnings to try and get Terry to stop the vehicle, but Terry continued. At this point, Tran is reasonably apprehending imminent danger to himself based on Terry's noncompliance and the general danger of the fleeing vehicle. Accordingly, Tran's use of deadly force was not unreasonable to this threat.

Finally, the Court considers whether the suspect actively resisted or tried to flee. It is clear that Terry actively attempted to flee. Terry started the engine, rolled up the windows, and began to accelerate the vehicle while ignoring Tran's verbal warnings.

[3] Plaintiffs also claim, without adequate support, that there is a "flat prohibition" against using deadly force against fleeing misdemeanants. Pl.'s Resp. 7, ECF No. 35. Plaintiffs cite *Tennessee v. Garner* in support, but this works against their case. *Id.* While the *Garner* Court does discuss the old common law rule forbidding deadly force against a fleeing misdemeanant, the thrust of the opinion is to eschew the traditional common law rules and lay down a new reasonableness test in their place. *See Garner*, 471 U.S. at 13 ([b]ecause of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism."). Under *Garner*, deadly force may be justified against a fleeing misdemeanant if the misdemeanant otherwise constitutes a threat of serious physical harm to the officer or to others. *See id.* at 14 (questioning the notion that "a "felon" is more dangerous than a misdemeanant" and noting that "numerous misdemeanors involve conduct more dangerous than many felonies").

For the above reasons, the Court finds that the Plaintiffs have not sufficiently alleged that Tran violated Terry's Fourth Amendment right to be free from excessive force in the context of an arrest.

b. Harmon has not Established a Fourth Amendment Violation as Harmon was not a Subject of Tran's Use of Force

Excessive force claims alleging an injury of emotional distress are limited by the fact that "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146 (1979). The Fifth Circuit further holds that "there is no constitutional right to be free from witnessing . . . police action." *Grandstaff v. Borger*, 767 F.2d 161, 172 (5th Cir. 1985). Thus, bystander claims for emotional distress under section 1983 often fail in the Fifth Circuit. *See id*.; *See also Coon v. Ledbetter*, 780 F.2d 1158, 1160–61 (1986).

In *Grandstaff*, James Grandstaff's wife and children watched as police officers directed gunfire at Grandstaff in his vehicle, ultimately killing him. 767 F.2d at 172. The Fifth Circuit allowed the family to recover on their state law claims for negligent infliction of emotional distress to a bystander, but found that similar claims for emotional distress under section 1983 should be denied, as the Constitution does not protect citizens from witnessing police action as a bystander. *Id*.

In *Ledbetter*, Billy Dan Coon engaged in a firefight with police officers before retreating into his trailer home, which the officers proceeded to fire at. 780 F.2d at 1660–61. Both his wife, who stood outside of the trailer during the altercation, and his four-year old daughter, who was in the trailer with her father as officers fired buckshot at the trailer's exterior, claimed a violation of their Fourth Amendment right to be free from excessive force under section 1983. *Id*. at 1161. The Fifth Circuit found that Coon's daughter had proven a violation of her personal rights, as she was

in the trailer with her father and was thus a subject of the gunfire. *Id*. Coon's wife's claim failed, though, because she was not directly involved in the shooting and "[t]here was no evidence that any act of the deputies was directed toward [her]." *Id*.

Here, Harmon's section 1983 claim fails as he was not a subject of Tran's use of force. Plaintiffs do not allege that Tran ever pointed his weapon at Harmon or threatened Harmon. They simply allege that the weapon was fired near Harmon's face. Am. Compl. ¶ 146, ECF No. 26. Harmon's proximity to the altercation does not change the fact that, following *Grandstaff*, Harmon has no constitutional entitlement to be free from witnessing violent police action. *See* 767 F.2d at 172.

Harmon's situation is further distinguishable from the daughter's situation in *Ledbetter*. In that case the officers' firing of buckshot was functionally directed at the trailer itself, including its inhabitants. *Ledbetter*, 780 F.2d at 1160–61. In this case, Harmon does not allege that Tran fired indiscriminately in the general direction of the vehicle, but that Tran "point[ed] his firearm across Harmon's face and discharge[ed] it." Am. Compl. ¶ 146, ECF No. 26. Taking these facts as they appear in the Amended Complaint, and the law as articulated in *Ledbetter*, Tran's actions were not directed at Harmon.

This analysis is further supported by *Petta v. Rivera*, 143 F.3d 895 (5th Cir. 1998). *Petta* involved the lengthy high-speed chase during which officers attempted to shoot out the tires of a woman's vehicle while her children were inside. 143 F.3d at 897–98, 902. The Fifth Circuit allowed the children's excessive force claims on the grounds that the officers' actions were, quite literally, "directed not only towards [the children's mother] but towards the car that [the children], too, occupied." *Id.* at 902–03. The situation of the children in *Petta* is analogous to that of the daughter in *Ledbetter*, who sat in a trailer as officers fired on it from range, and not to that of

Harmon, who sat nearby as Tran pointed his pistol directly at Terry from close range and fired. 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.

Because the facts alleged clearly establish that Harmon was not the subject of Tran's use of force, Harmon fails to allege a violation of his Fourth Amendment right to be free from excessive force under section 1983.

2. The Violation of a Clearly Established Right

The second prong in the qualified immunity analysis is whether clearly established law prohibited the official from acting as he did in the circumstances of the case. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, 136 U.S. 305, 308 (2015) (per curiam) (quoting *Reichle v. Howards*, 556 U.S. 658, 664 (2012)). Existing precedent must have placed the right, and the particular way in which it was allegedly violated, beyond debate. *Id.* These precedents need not perfectly match the circumstances of the case at bar, but they must outline the right and the manner of its violation with a high degree of specificity. *Id.*

a. Terry's Right was not Clearly Established

The Supreme Court has established that where "a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Garner*, 471 U.S. at 11. Furthermore, the Fifth Circuit holds it to be "clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat

of harm to the officer or other. . . . [including] in the more specific context of shooting a suspect fleeing in a motor vehicle." *Lytle*, 560 F.3d at 417–418 (citing *Estate of Kirby v. Duva*, 530 F.3d 475, 483–84 (5th Cir. 2008); *Vaughan v. Cox*, 343 F.3d 1323, 1332–33 (5th Cir. 2003)).

Plaintiffs do not meet their burden of demonstrating that Tran's use of deadly force against a Terry violated clearly established law. Both *Garner* and *Lytle* hold that an officer may not use deadly force to prevent the escape of a non-threatening suspect fleeing in a motor vehicle, but the facts here differ. Again, while precedent need not perfectly match the circumstances of a case, they must outline the right and the manner of its violation with a high degree of specificity. While the cases discussed outline an officer in a forward path of a car, an officer being dragged, and an officer shooting a fleeing unarmed fleeing suspect, the parameters are not close enough to clearly establish that an officer may not use deadly force when he is on the side of a vehicle while the driver is driving away in blatant disregard of his instructions. For those reasons, Tran's use of deadly force did not violate clearly established law.

Based on the foregoing reasons, the Court finds that Tran is entitled to qualified immunity on this front.

b. The Court does not Reach the Second Prong for Harmon's Claim

Because a plaintiff's claim under section 1983 must overcome both prongs of qualified immunity, "[a] federal court can grant qualified immunity by addressing either step or both of them." *Cleveland v. Bell*, 938 F.3d 672, 676 (5th Cir. 2019) (citing *Pearson*, 555 U.S. at 236; *Morrow v. Meachum*, 917 F.3d 870, 874 (5th Cir. 2019)).

Here, because Plaintiff Harmon's claim fails to overcome the first prong of Tran's assertion of qualified immunity by establishing the violation of a constitutional right, the Court need not reach the second prong of whether Harmon's right was clearly established.

B. Municipal Liability

1. Administratrix Woods's municipal liability claims fail because they do not meet each of the three required elements required.

It is rare that a municipality will be found liable for an isolated unconstitutional act committed by one of its employees. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (citation omitted). Municipalities cannot be held liable under section 1983 on a *respondeat superior* theory, and a city is not liable where an injury is caused solely by one of its employees. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 690 (1978). Proof of municipal liability 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). Each of these elements is critical to a successful claim, and "[m]istakes in analyzing section 1983 municipal liability cases frequently begin with a failure to separate the three attribution principles and to consider each in light of relevant case law." *Piotrowski*, 237 F.3d at 578.

First, Plaintiffs must demonstrate the existence of a municipal policy or custom. "The description of a policy or custom and its relationship to the underlying constitutional violation . . . cannot be conclusory; it must contain specific facts. *Spiller v. City of Tex. City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997). To prove the existence of a custom, a plaintiff must demonstrate a "persistent, widespread practice of city officials . . . 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." *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992) (quoting *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984) (en banc)).

Second, Plaintiffs must identify a specific policy maker possessing both policy-making authority and actual or constructive knowledge of the alleged custom. "Actual knowledge may be

shown by such means as discussions at council meetings or receipt of written information." *Bennett*, 728 F.2d at 768. "Constructive knowledge may be attributed to the governing body on the ground that it would have known of the violations if it had properly exercised its responsibilities, as, for example, where the violations were so persistent and widespread that they were the subject of prolonged public discussion or of a high degree of publicity." *Id*.

Finally, Plaintiffs must prove that the custom or policy in question was the moving force behind the underlying constitutional violation in their case. For a municipal custom to be found as the "moving force" behind a constitutional deprivation, there first "must be a direct causal link between the municipal policy [or custom] and the constitutional deprivation." *Piotrowski*, 237 F.3d at 580. This causal link between custom and constitutional violation "must be more than a mere 'but for' coupling between cause and effect." *Fraire v. City of Arlington*, 957 F.2d 1268, 1281 (5th Cir. 1992). The Fifth Circuit has emphasized that this requirement "must not be diluted, for where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability." *Piotrowski*, 237 F.3d at 580 (internal quotation marks omitted) (quoting *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998)).

Here, Plaintiffs allege that (1) the City of Arlington had actual knowledge of Tran's history of violent misconduct, yet failed to adequately discipline him, and (2) that the City of Arlington had constructive knowledge of the Arlington Police Department's customs of using excessive force, engaging in racial discrimination, and lack of adequate training in relevant policing methods, yet ignored them. Am. Compl. ¶ ¶ 133, 134, ECF No. 26.

To the first allegation, Plaintiffs fail to either identify a specific policymaker responsible for disciplining Tran or provide a sufficient factual basis from which to infer actual knowledge. Elsewhere, Plaintiffs broadly identify the Arlington Police Department as being responsible for

and failing to properly discipline Tran for past instances of alleged misconduct. Am. Compl. ¶ 116, ECF No. 26. However, in their claim for municipal liability, Plaintiffs simply identify "the City of Arlington" as a policy maker which "had actual knowledge of Tran's repeated violent and criminal conduct." *Id*. at ¶ 133. This statement is conclusory, and the pleadings do not allege factual support for the notion that the City of Arlington itself, as a policy maker, had actual knowledge of instances of misconduct by Tran that were dealt with at the departmental level.

To the second allegation, Plaintiffs impute constructive knowledge of several alleged unconstitutional customs to the City of Arlington on account of its "wanton and deliberate indifference to the rights of its citizens" and ignorance of "the multiple signs" of excessive force, racial bias, and insufficient training in the Arlington Police Department. *Id*. at ¶ 134. Taken alongside the multiple instances of alleged excessive force and racial bias contained elsewhere in the complaint, this sufficiently alleges under *Bennett*'s standard for constructive knowledge that the City, as the governing body, "would have known of the violations if it had properly exercised its responsibilities." *See* 728 F.2d at 768.

However, Plaintiffs fail to support this second allegation with a sufficient demonstration that any of the alleged customs were the moving force behind Tran's actions. Plaintiffs' Amended Complaint simply states that "[t]hese customs, patterns, and practices were a moving force in the deprivation of O'Shae Terry's constitutional rights." Am. Compl. ¶ 135, ECF No. 26. Setting aside the fact that this conclusory statement fails to accurately mirror *Monell*'s language,[4] it is unsupported by factual allegations suggesting a direct causal link between the alleged customs and Tran's actions. While Plaintiffs include lengthy descriptions of other incidents involving alleged excessive force and racial bias in the Arlington Police Department, they do little to tie these

[4] This language originally appears in *Monell* as "the moving force," and not "a moving force." 436 U.S. at 694.

incidents to Tran's actions beyond vaguely insinuating factual similarities. These insinuations do not meet the required standard of alleging a direct causal relationship at a level surpassing a mere but-for coupling of cause and effect. *See Fraire*, 957 F.2d at 1281.

Neither of Administratrix Woods's municipal liability theories meet each of the three required elements for a municipal liability claim. The first theory fails to identify a specific policy maker or adequately support the conclusory assertion of actual knowledge of the alleged custom. The second theory fails to sufficiently allege that the alleged customs were the moving force behind Tran's actions in the case at hand. As a result, the claims fail as a matter of law.

2. Plaintiff Harmon's municipal liability claims should be dismissed, as he has not adequately pled an underlying deprivation of his constitutional rights

A plaintiff cannot recover for municipal liability if they have not suffered a deprivation of their constitutional rights. *See Monell*, 436 U.S. at 690. Here, because Harmon's underlying section 1983 claim for violation of his Fourth Amendment rights fails, he has no underlying constitutional violation on which to base his municipal liability. As a result, his claims fail.

C. State Law Claims

1. Both Plaintiffs' Assault and Battery Claims should be Dismissed under the Tort Claims Act

"The Tort Claims Act (the "TCA"), contained in chapter 101 of the Texas Civil Practice and Remedies Code, provides a limited waiver of immunity for tort suits against the government." *Tex. Dep't of Aging & Disability Servs. v. Cannon*, 453 S.W.3d 411, 414 (Tex. 2015) (citation omitted). Section 101.106 of the TCA was enacted to prevent governments and employees from having to defend duplicative claims by preventing suit of individual employees rather than the governmental entity itself. *Id.* at 414–15. This section provides in relevant part that:

> (e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.
> (f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

Tex. Civ. Prac. & Rem. Code § 101.106 (e)–(f). All tort theories alleged against a governmental entity under Texas state law, whether against the government alone or along with its employees, are treated as if they are brought under the Tort Claims Act. *Cannon*, 453 S.W.3d at 415 (citing *Franka v. Velasquez*, 332 S.W.3d 367, 379–80 (Tex. 2011); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008)). Furthermore, by TCA section 101.106's protections have been held to defeat even claims such as intentional torts which are otherwise exempted. *See Davray, Inc. v. City of Midlothian, Tex.*, No. 3:04-CV-0539-B, 2005 U.S. Dist. LEXIS 41250, at *54 (N.D. Tex. July 6, 2005) (citing *Newman v. Obersteller*, 960 S.W.2d 621, 622–23 (Tex. 1997)).

Suits against a governmental officer acting in their official capacity "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Id*. at *52 (quoting *Hafer v. Melo*, 502 U.S. 21, 25 (1991)). Such suits can thus be treated as suits against the governmental entity itself. *Id*. (citing *Schauer v. Morgan*, 175 S.W.3d 397, 400 (Tex. App.—Houston [1st] 2005, no pet.); *Flores v. Sanchez*, No. EP-04-CA-056-PRM, 2005 U.S. Dist. LEXIS 11617, at *3 (W.D. Tex. June 14, 2005)).

In *Davray*, the plaintiffs brought several state law tort claims, naming three municipal officials as defendants but not naming the City of Midlothian itself. 2005 U.S. Dist. LEXIS 41250, at *50. Despite this, the plaintiffs alleged in their complaint that the officials were "being sued in

their individual and official capacities." *Id*. This language was enough for the court to treat the plaintiff's claims against defendants in their official capacities as "actually claims against the City." *Id*. at 52. This meant that plaintiffs had sued both the municipality and its individual employees, triggering section 101.106(e) of the TCA, and leading to the dismissal of the state law claims against the individual defendants on the city's timely motion. *Id*. The *Davray* Court also dismissed the claims against the city, on the grounds that the city had not waived its immunity from suit for intentional tort claims under TCA section 101.057. *Id*. at *53.

Here, Plaintiffs plainly allege in both of their state law claims that Tran committed the alleged torts "while acting within the course and scope of his duties as a Police Officer." Am. Compl. ¶ ¶ 139, 157, ECF No. 26. In doing so, they commit the same error as the plaintiffs in *Davray*. Because Plaintiffs allege that Tran committed the alleged torts within the scope of his official duties, this Court must treat the allegations as claims against both Tran and the City of Arlington.

This analysis allows the Court to invoke TCA sections 101.106 (e) and (f), either of which leads to the dismissal of Plaintiffs' claims. Under 101.106 (e), where, as here, a plaintiff sues both a governmental unit and its employees, "the employees shall immediately be dismissed on the filing of a motion by the governmental unit." Tex. Civ. Prac. & Rem. Code § 101.106 (e). The City of Arlington made such a motion at an earlier stage in the litigation before Plaintiffs had amended their complaint and removed the City as an affirmatively named defendant to the state law claims. *See* Def.'s Mot. to Dismiss 24–25, ECF No. 8. Thus, the intentional tort claims against Tran should have first been dismissed after Arlington's first motion to dismiss.

Alternatively, ignoring the earlier stage of the litigation and taking Plaintiffs' amended complaint at face value leads to the same functional result. Plaintiffs' allegation that Tran acted

within the scope of his employment duties places their claim under TCA section 101.106(f), which requires that "[o]n the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed." Tex. Civ. Prac. & Rem. Code § 101.106 (f). Tran requested dismissal on the basis of TCA section 101.106(f) in his second motion to dismiss. Def.'s Mot. to Dismiss 22, ECF No. 32. As the time elapsed since this motion is well in excess of thirty days, the claims should be dismissed.

Finally, to the extent that independent tort claims are still alleged against the City of Arlington, these allegations fail under TCA section 101.057, which exempts certain intentional torts such as assault and battery under the statutory framework. Tex. Civ. Prac. & Rem. Code § 101.057 (2). As it states in its original motion to dismiss, Arlington does not waive its immunity from intentional tort claims. Def.'s Mot. to Dismiss 24, ECF No. 8. Therefore, following the result in *Davray*, any intentional tort claims remaining against the City of Arlington should be dismissed as well.

2. Punitive and Exemplary Damages

"Punitive damages are a particular remedial mechanism normally available in the federal courts . . . and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights." *Carlson v. Green*, 446 U.S. 14, 22 (1980) (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971)) (internal quotation marks omitted). Punitive damages may be awarded in a "proper § 1983 action" for the purpose of deterring the malicious deprivation of rights. *Id.*; *Carey v. Piphus*, 435 U.S. 247, 257, n.11 (1978). Recovering for punitive damages under section 1983 requires a showing of the

requisite intent of an act "maliciously, or wantonly, or oppressively done." *See Smith v. Wade*, 461 U.S. 30, 45–51 (1983) (citation omitted).

a. Administratrix Woods's Claim for Punitive Damages Fail because Tran is Entitled to Qualified Immunity

Because the Court finds that Tran did not violate clearly established law and is entitled to qualified immunity, Administratrix Woods cannot recover against him for punitive damages.

b. Harmon's Claim for Punitive Damages Fails as a Matter of Law

Punitive damages serve to redress the violation of a citizen's constitutional rights. Because Harmon has not sufficiently alleged an underlying violation of his constitutional rights, his claim for punitive damages fails as a matter of law.

D. Motions to Dismiss

It is appropriate to grant a motion to dismiss filed pursuant to Rule 12(b)(6) when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). Based on the foregoing evidence, the Court finds that: 1) Administratrix Woods's well-pleaded factual allegations cannot go forward because Tran is entitled to qualified immunity; 2) Harmon's well-pleaded factual allegations fail to state a facially plausible claim that Tran is liable for violating Harmon's Fourth Amendment rights; 3) neither of the Plaintiffs' well-pleaded factual allegations succeed in establishing a facially plausible claim that the City of Arlington is liable for violating Terry or Harmon's constitutional rights under a theory of municipal liability; 4) neither of the Plaintiffs' well-pleaded factual allegations succeed in establishing a facially plausible claim that Tran is liable for either tortuously assaulting and battering Terry, or for tortuously assaulting Harmon; 5) Administratrix Woods's well-pleaded factual allegations cannot go forward because Tran is entitled to qualified immunity; and 6) Harmon's well-pleaded factual

allegations do not state a facially plausible claim that Tran is liable for punitive damages for his actions towards Harmon.

Accordingly, the City of Arlington's Motion to dismiss is **GRANTED**, and Tran's Motion to Dismiss is **GRANTED**

IV. CONCLUSION

Based on the foregoing, the Court finds that Defendant the City of Arlington's Motion to dismiss should be and is hereby **GRANTED**, and that Defendant Tran's Motion to Dismiss should be and is hereby **GRANTED**.

SO ORDERED on this **12th day** of **August, 2020.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE