

KIMBERLEY COLE, JOHNNYE WAKEFIELD, Officer JULIA MENCHACA, Officer AMY WILBURN, and ANGELIA HEROD-GRAHAM (collectively referred to as “Defendants” or “CITY OF DALLAS Agents”) with this Original Complaint allege as follows:

I.

NATURE AND PURPOSE OF THE ACTION

1. On August 17, 2012, DEANNA COOK, a person known to police to have been involved in, and seemingly escaped, a domestically violent relationship, cried out to the DALLAS POLICE DEPARTMENT for assistance and to save her life. Ms. Cook died as police failed to timely respond with assistance, arrived 50 minutes after her 9-1-1 call, and did not provide experienced police officers to fully investigate her life-threatening 9-1-1 call.

2. Plaintiffs allege that the CITY OF DALLAS had a duty, but failed to implement policies, practices and procedures that respected DEANNA COOK’s constitutional rights to assistance, protection, medical treatment, and equal treatment under the law. Defendant’s failure to implement the necessary policies and the implementation of unconstitutional policies deprived DEANNA COOK of equal protection and due process under the Fourteenth Amendment and caused her unwarranted and excruciating physical and mental anguish and death. For these civil rights’ violations, and other causes of action discussed herein, Plaintiffs seek answers and compensation for their damages and the death of DEANNA COOK.

3. Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988; the Fourteenth Amendment to the United States Constitution; Tex. Civ. Prac. & Rem. Code §§ 71.002 and 71.021 and other constitutional provisions and laws of the United States and the State of Texas, to recover damages for the death of DEANNA COOK, while she sought protection, medical treatment and assistance from Defendants, and for the deprivation of her rights under color of law and in violation of federal law.

II. JURISDICTION AND VENUE

4. This court has original jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343 since Plaintiffs are suing for relief under 42 U.S.C. §1983. This Court has jurisdiction over Plaintiffs' other claims under principles of pendent, ancillary and supplemental jurisdiction under 28 U.S.C § 1367.

5. Venue is appropriate in the United States District Court; Northern District of Texas, Dallas Division, since the city of Dallas was the location of events made the basis of this cause of action.

III. PARTIES

6. Plaintiff VICKIE COOK resides in Dallas County, Texas.

7. Plaintiffs N'EYCEA WILLIAMS and ANIYA WILLIAMS are minors residing in Dallas and bring this action by and through their Grandmother, Guardian, and Next Friend, VICKIE COOK.

8. Plaintiff KARLETHA COOK-GUNDY resides in Dallas County, Texas.

9. Defendant the CITY OF DALLAS is a municipality of the State of Texas.

10. The CITY OF DALLAS funds and operates the CITY OF DALLAS POLICE DEPARTMENT, which, along with the Dallas City Manager's office, is responsible for the implementation of the police department's budget, policies, procedures, practices, and customs, as well as the acts and omissions, challenged by this suit. The CITY OF DALLAS POLICE DEPARTMENT is also responsible for preventive, investigative, and enforcement services for all citizens of the CITY OF DALLAS.

11. Defendant CITY OF DALLAS is responsible for ensuring that all of its facilities, including the 9-1-1 call center, are in compliance with federal and state law, department or agency policies, rules, and regulations, and related standards of care.

12. Defendant CITY OF DALLAS is the employer of individual Defendants TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, Officer JULIA MENCHACA, Officer AMY WILBURN, and ANGELIA HEROD-GRAHAM and is responsible for the acts and/or omissions of same that were performed in the course and scope of their employment.

13. Service of Process may be had on the CITY OF DALLAS by serving its City Secretary, Rosa A. Rios, Dallas City Hall, 1500 Marilla Street, Room 5DS, Dallas, TX 75201-6622. The other Defendants may be served in accordance with Rule 5 of the Federal Rules of Civil Procedure.

IV. STATE ACTION

14. To the extent applicable, Defendants were acting under color of state law when they subjected DEANNA COOK to the wrongs and injuries hereinafter set forth.

V. FACTS PARTICULAR TO PLAINTIFFS' CLAIMS

DEANNA COOK DIALS 9-1-1 AND PLEADS FOR HELP FROM DEFENDANTS

15. On Friday, August 17, 2012, while an intruder was attacking her inside her home, DEANNA COOK, a 32 year-old mother of two, managed to dial 9-1-1 for assistance. Ms. Cook was screaming at the top of her lungs in fear, begging for assistance from the 9-1-1 Call Center.

16. After Ms. Cook's 9-1-1 call initially went into a holding queue, the call was eventually taken by Defendant TONYITA HOPKINS, who was employed in the 9-1-1 call

center of the CITY OF DALLAS POLICE DEPARTMENT's Communications Section. At the time of the call, TONYITA HOPKINS, upon information and belief, was working overtime.

17. Upon information and belief, the street name and block range for Ms. Cook's residence immediately appeared on the 9-1-1 call center screen. Accordingly, a police officer could have been dispatched immediately to that block, with a specific address to be provided while the officer was en route.

18. At the time of Ms. Cook's call, KIMBERLEY COLE had deserted her post in violation of DALLAS POLICE DEPARTMENT policy. As a result, assistance with handling and classifying Ms. Cook's call had to be provided by JOHNNYE WAKEFIELD.

19. From the tone of Ms. Cook's voice and statements that her life was in jeopardy, it was, or should have been, obvious to TONYITA HOPKINS and JOHNNYE WAKEFIELD that there was a physical disturbance in Ms. Cook's home and that her life was being threatened.

20. Despite that it was apparent that Ms. Cook was being threatened, attacked and was in fear for her life, it took nearly ten (10) minutes to finally initiate a "dispatch" request for officers to go to Ms. Cook's southeast Dallas home. Upon information and belief, Ms. Cook's 9-1-1 call lasts approximately 11 minutes.

21. At some point during Ms. Cook's 9-1-1 call, JOHNNYE WAKEFIELD advised TONYITA HOPKINS to disconnect Ms. Cook's call and call her back. Not surprisingly, after doing so, she received Ms. Cook's voicemail.

22. At no point did JOHNNYE WAKEFIELD or TONYITA HOPKINS notify a police dispatch supervisor or ask that police be dispatched immediately to Ms. Cook's residence.

23. Neither JOHNNYE WAKEFIELD nor TONYITA HOPKINS did any follow-up to ensure that police dispatch had sent officers to Ms. Cook's residence.

THE POLICE DEPARTMENT DEMONSTRATE NO RUSH TO HELP MS. COOK

24. At some point after Ms. Cook's 9-1-1 call, YAMINAH SHANI MITCHELL, a relief police dispatcher, was made aware of Ms. Cook's 9-1-1 call and was aware that police had an exact address for Ms. Cook's residence and that the call had been marked "Urgent! Updated address; disturbance still heard in the background."

25. Instead of prioritizing Ms. Cook's 9-1-1 call, dispatcher MITCHELL allowed officers simply to volunteer for the call.

26. Officers JULIA MENCHACA and AMY WILBURN originally volunteered to check into DEANNA COOK's call.

27. While supposedly en route to Ms. Cook's residence, Officers MENCHACA and WILBURN stopped to investigate a residential burglary alarm call on Earnhardt Way that was a false alarm.

28. Also, while en route to Ms. Cook's residence, Officers MENCHACA and WILBURN stopped at a 7-11 convenience store to make personal purchases. While Officer WILBURN was inside the convenience store, Officer MENCHACA asked dispatcher MITCHELL to take them off Ms. Cook's call. According to the officers, dispatcher MITCHELL misunderstood the request.

29. Prior to arriving at Ms. Cook's residence, Officers MENCHACA and WILBURN also took time out to complete disposition comments for a previous call that had been resolved.

30. Prior to arriving at Ms. Cook's residence, Officers MENCHACA and WILBURN were made aware that Ms. Cook was screaming for help and that a scuffle could be heard in the background of her 9-1-1 call.

31. Officers MENCHACA and WILBURN did not use lights, sirens, or speed to drive to Ms. Cook's residence.

32. At the time of Ms. Cook's 9-1-1 call, as the result of numerous other calls Ms. Cook made to police, THE DALLAS POLICE DEPARTMENT was aware that DEANNA COOK had been a domestic abuse victim and that the alleged suspect had been stalking her at her residence.

THE POLICE FINALLY ARRIVE, BUT CONTINUE TO NOT TAKE MS. COOK'S PLEAS SERIOUSLY

33. Nearly 50 minutes after DEANNA COOK's 11-minute 9-1-1 call was placed, Officers MENCHACA and WILBURN finally arrived at Ms. Cook's southeast Dallas house.

34. While at Ms. Cook's residence, Officers MENCHACA and WILBURN did not go around to the rear of Ms. Cook's residence, did not peek through all of Ms. Cook's windows (where they would have seen signs in her bedroom of a violent physical altercation), and never attempted to forcibly gain entry into the home.

35. Upon information and belief, officers MENCHACA and WILBURN simply knocked on the door and had someone call Ms. Cook's cellular phone. Not surprisingly, the call went to voicemail.

36. While at the residence, Officers MENCHACA and WILBURN were aware that Ms. Cook had previously reported claims of domestic violence and stalking.

37. Nevertheless, shortly after they arrived, officers MENCHACA and WILBURN left, without performing any additional investigation of Ms. Cook's whereabouts, her residence, or her 9-1-1 call.

MS. COOK'S FAMILY FIND HER DEAD IN HER BATHTUB

38. Two days later, on August 19, 2012, after Ms. Cook did not show up for church, her daughters N'EYCEA WILLIAMS and ANIYA WILLIAMS, mother VICKIE COOK, and sister KARLETHA COOK-GUNDY went to Ms. Cook's residence.

39. Once at Ms. Cook's home, her family noticed that two of her dogs (who were normally kept inside the house) were outside barking frantically. Water was leaking from Ms. Cook's garage and other places.

40. Suspecting foul play, Ms. Cook's mother, VICKIE COOK, called 9-1-1 for assistance, after getting no response to knocks on the door or repeated calls to Ms. Cook's cellular phone.

41. During the 9-1-1 call from Ms. Cook's mother, Call Taker ANGELIA HEROD-GRAHAM instructed Ms. Cook's mother that the DALLAS POLICE DEPARTMENT would not send officers out and asked whether Ms. Cook's family had contacted the jails and local hospitals to look for Ms. Cook, although they were reporting that DEANNA COOK was missing.

42. ANGELIA HEROD-GRAHAM has stated that she was trained by the DALLAS POLICE DEPARTMENT that in instances such as this she should ask questions that she asked Ms. Cook's mother, despite that Ms. Cook's mother was pleading for help locating her missing daughter.

43. After being denied any assistance from the DALLAS POLICE DEPARTMENT, Ms. Cook's family began to take matters into their own hands to locate their loved one. Ms. Cook's sister, mother and daughter then went to the rear of her residence, where they kicked the patio door down, and immediately noticed water flowing all throughout the house.

44. After entering the residence, Ms. Cook's family was nearly overcome by the stench coming from Ms. Cook's bedroom. They also noticed that Ms. Cook's bedroom door had been kicked in and her home showed clear signs of foul play.

45. Upon walking into Ms. Cook's bathroom, the family observed Ms. Cook's partially clad body laying side-ways, half-in and half-out of the bathtub, floating atop the cold overflowing water. Her body was severely discolored and skin abnormally wrinkly.

46. Immediately upon Ms. Cook's family seeing her body, ANGELIA HEROD-GRAHAM overheard Ms. Cook's family screaming in shock and agony at finding their loved one in this condition and despite all the pleas for assistance from the police.

47. More than 12 minutes after her initial 9-1-1 call, Ms. Cook's mother spoke to a 9-1-1 operator again and was advised to exit the home. After the police finally arrived, DEANNA COOK's body was taken directly to the morgue.

ADMISSION OF FAULT

48. On or about August 25, 2012, while attending a community meeting in South Dallas, Chief David O. Brown ("Chief Brown") admitted that the police communications center caused Ms. Cook's death when the Police Chief stated "[the 9-1-1 operator] obviously failed at that, and it cost the life of Ms. Cook,"

THE 9-1-1 DEFICIENCIES AT THE TIME OF MS. COOK'S DEATH

49. The Texas Legislature created the Commission on State Emergency Communications (CSEC), which is an agency of the State of Texas charged with oversight of the Statewide 9-1-1 system. The 9-1-1 Program is funded from the fee on each telephone line reflected on an individual's telephone bill (*i.e.* wireline, wireless and VoIP). The CSEC's role is to preserve and enhance public safety and health in Texas through reliable access to emergency

communications services. The CSEC is also charged with developing minimum performance standards for equipment and operation of 9-1-1 service recommend minimum training standards, assist in training, and provide assistance in the establishment and operation of 9-1-1 service.

50. Upon information and belief, the CITY OF DALLAS has been recognized as a municipal emergency communications district pursuant to Health and Safety Code Chapter 772.

51. The city's 9-1-1 call center is located in the basement of Dallas City Hall. The funding for the center is provided in budgets prepare by the City Manager's office.

52. At the time of Ms. Cook's death, there were 90 positions in the 9-1-1 communications section, yet only 64 were filled. Many employees were working overtime to try and do the work required by the unfilled positions.

53. At the 9-1-1 call center, overworked operators struggle to handle massive numbers of calls and it is not uncommon that incorrect and incomplete information is passed from call takers to police officers in the field.

54. Upon information and belief, at the time of Ms. Cook's death, the CITY OF DALLAS' 9-1-1 call center had inadequate operations, inadequate technology, insufficient staffing, inadequate training, improper disciplinary procedures and unsatisfactory procedures to provide proper handling of 9-1-1 calls in accordance with the goals of the CSEC and reasonable expectations.

55. According to Chief Brown, officers respond to critical calls within "six" minutes. However, it took approximately 50 minutes to respond to Ms. Cook's 9-1-1 cries for help and even after the officers arrived, her call was not treated as a serious call.

56. At the time of DEANNA COOK's 9-1-1 call, there was no supervisor on the floor to assist with such a high priority situation. According to Dallas Police Chief Brown, there is "[n]o excuse for leaving the floor when a supervisor is required on the floor at all times."

57. According to KIMBERLEY COLE, however, as a result of "shortages in management and other pressing duties," she requested that JOHNNYE WAKEFIELD cover for her on the day of Ms. Cook's call.

58. Since Ms. Cook's death, the CITY OF DALLAS has attempted to "pass the buck" away from the CITY OF DALLAS on the inadequate 9-1-1 procedures and customs by firing ANGELIA HEROD-GRAHAM and suspending TONYITA HOPKINS for 10 days and re-assigning her to another work group within the DALLAS POLICE DEPARTMENT.

THE DALLAS POLICE DEPARTMENT'S NEW 9-1-1 CLASSIFICATIONS

59. Chief Brown has admitted that "there is a need for technological upgrades in the city's 9-1-1 call center."

60. Since DEANNA COOK's death, the CITY OF DALLAS has implemented new classifications, "6XE-Major Disturbance Emergency," and "6XEA-Major Disturbance Emergency Ambulance, indicating a threat of imminent serious bodily injury or death.

61. There was nothing that prohibited these, or similar, classifications from being put in place prior to August 17, 2012, the date of DEANNA COOK's 9-1-1 call.

VIOLENCE AGAINST WOMEN ACTS AND PROGRAMS

62. In or about 1994, Congress passed the Violence Against Women Act ("VAWA") as part of the federal Violent Crime Control and Law Enforcement Act. VAWA was developed and passed as a result of extensive grassroots efforts by advocates and professionals from the battered women's movement, sexual assault advocates, victim services field, law enforcement

agencies, prosecutors' offices, the courts, and the private bar urging Congress to adopt significant legislation to address domestic and sexual violence.

63. Since its original passage, VAWA's focus has expanded from domestic violence and sexual assault to also include dating violence and stalking. It funds services to protect adult and teen victims of these crimes, and supports training on these issues, to ensure consistent responses across the country.

64. VAWA has a huge emphasis on a coordinated community response to domestic violence, dating violence, sexual assault, and stalking; courts, law enforcement, prosecutors, victim services, and the private bar currently work together in a coordinated effort that had not heretofore existed on the state and local levels.

65. VAWA creates a federal cause of action under certain circumstances. VAWA also discusses the influence on domestic violence victims of the clear lack of support from police.

66. In Texas, the legislature enacted Section 22.01 of the Texas Penal Code, which evidences a clear desire on the part of the Texas legislature to address meaningfully the very serious and troubling issue of domestic violence and to provide increased protection to the victims of domestic violence in Texas, of which the DEANNA COOK was included.

67. According to the Texas Governor's Commission on Women, for calendar year 2009, 111 women were killed by their former or current husband, intimate partner or boyfriend. This "reported" number represented over one-third of all women killed. This was up from 2000 when 104 women in Texas were killed by their intimate male partners and 177,176 family violence incidents were reported. Additional victims remain uncounted. Research into domestic

homicides typically reveals these to be crimes of accumulation in which men's violence and women's entrapment seem to intensify over time.

68. In 1985, the Texas legislature highlighted the duties of police officers in domestic violence situations in Art. 5.04(a) of the Code of Criminal Procedure, providing that "the responding law enforcement or judicial officers shall protect the victim, without regard to the relationship between the alleged offender and victim." This statute also provides that "[a] peace officer who investigates a family violence allegation or who responds to a disturbance call that may involve family violence shall advise any possible adult victim of all reasonable means to prevent further family violence, including giving written notice of a victim's legal rights and remedies and of the availability of shelter or other community services for family violence victims."

69. Additionally, according to the Dallas City Attorney's website, it "works with police officers to obtain information necessary to effectively prosecute domestic violence cases such as the victim/witness contact information and a report providing explicit details about the violence." The website also indicates that it provides "victim services" and instructs victims to "Dial 9-1-1 if you are in immediate danger."

70. Upon information and belief, the DALLAS POLICE DEPARTMENT has not implemented policies and procedures to aggressively fight domestic violence, to address the influence on domestic violence victims of lack of support from police or to provide prioritized responses and assistance to victims of domestic violence.

VI. CAUSES OF ACTION

COUNT ONE: CLAIMS UNDER 42 U.S.C. §1983 AND THE 14TH AMENDMENT TO THE U.S. CONSTITUTION

71. Plaintiffs reallege and incorporate by reference the allegations set forth in all preceding paragraphs as if set forth fully and reiterated here in their entirety.

72. According to its website, the DALLAS POLICE DEPARTMENT, in serving the people of Dallas, “strives to reduce crime and provide a safe city” by, inter alia, “recognizing that its goal is to help people and provide assistance at every opportunity...and to provide preventive, investigative, and enforcement services.” The website also indicates that Dallas police officers will “[p]erform their duties with the knowledge that protection of the lives and property of all citizens is their primary duty.”

73. The Defendants, acting under color of law and acting pursuant to customs, practices and policies of the CITY OF DALLAS deprived DEANNA COOK of rights and privileges secured to her by the Fourteenth Amendment to the United States Constitution and by other laws of the United States, by failing to provide proper emergency assistance in violation of 42 U.S.C. § 1983 and related provisions of federal law and in violation of the above cited constitutional provisions.

74. With respect to the claims made the basis of this lawsuit, the CITY OF DALLAS failed to adequately train its employees regarding responding to and conducting investigations of domestic violence claims. This failure to train its employees in a relevant respect reflects a deliberate indifference to the rights of the city’s inhabitants and is actionable under 42 U.S.C. § 1983.

75. The CITY OF DALLAS failed properly to discipline its employees regarding responding to 9-1-1 calls and conducting an investigation of calls. This failure to discipline its employees in a relevant respect reflects a deliberate indifference to the rights of its inhabitants and is actionable under 42 U.S.C. § 1983.

76. Upon information and belief, the CITY OF DALLAS has a policy, practice, or custom of law enforcement that provides less protection (e.g. by not responding at all or purposefully delaying its response) to female victims of domestic assault than to victims of other assaults. This discrimination against women was a motivating factor in the refusal to prioritize and respond quickly to Ms. Cook's 9-1-1 call and her death was the result of the CITY OF DALLAS' policy, custom, or practice, as well as their inaction in response to the call.

77. Upon information and belief, the CITY OF DALLAS has a policy, practice, or custom of law enforcement that provides less protection to female victims of domestic assault than to victims of other assaults through not providing the information that is required by Art. 5.04(a) of the Texas Code of Criminal Procedure. This discrimination against women was a motivating factor in the refusal to properly investigate Ms. Cook's call and her death was the result of the CITY OF DALLAS' policy, custom, or practice, as well as their inaction in response to the call.

78. Upon information and belief, the CITY OF DALLAS has a policy, practice, or custom of law enforcement that provides less protection or assistance to female victims in high crime and predominantly minority-race neighborhoods than to victims in other neighborhoods. This discrimination was a motivating factor in the refusal to prioritize and respond quickly to Ms. Cook's 9-1-1 call and her death was the result of the CITY OF DALLAS' policy, custom, or practice, as well as their inaction in response to the call.

79. Defendants responded differently to DEANNA COOK's 9-1-1 call arising from her impending murder than if the call had been made by someone similarly situated but of a non-minority race and/or in a more affluent neighborhood. Defendants did not respond to Ms. Cook's 9-1-1 call timely, or seriously, and conducted a shoddy investigation once the officers

finally arrived at DEANNA COOK's residence. This was because Defendants continually believed this domestic situation in a less affluent neighborhood was less deserving of their attention. Such conduct is not at all related to any governmental purpose.

80. On information and belief, Defendant CITY OF DALLAS, acting through official policies, practices, and customs, and with deliberate, callous, and conscious indifference to the constitutional rights of DEANNA COOK failed to implement the policies, procedures; and practices necessary to provide constitutionally adequate protection and assistance to DEANNA COOK during her plea for assistance and implemented policies, procedures, and practices which actually interfered with or prevented with or prevented DEANNA COOK from receiving the protection, assistance and care she deserved.

81. For instance, the following conduct, policies, and customs, *inter alia*, by Defendants violated DEANNA COOK's constitutional rights:

- a. The CITY OF DALLAS' failure to adequately train or discipline its employees;
- b. Defendants' policy of giving lower priority to 9-1-1 domestic violence calls than to non-domestic violence calls;
- c. Defendants' policy of not giving patrol officers the green light to drive fast with their lights and sirens and to make an emergency entry when the investigation involves domestic violence claims;
- d. Failing to prioritize DEANNA COOK's call the way Defendants would have had she resided in a more affluent, non-minority, neighborhood;
- e. The department's policy of responding earlier to 9-1-1 calls from more affluent, non-minority areas, than they did for DEANNA COOK;
- f. Responding to DEANNA COOK's call and arriving at her residence at a time considerably in excess of the time in which Defendants would have responded to a similarly situated person in a more affluent section of the CITY OF DALLAS that did not have a predominantly minority population;
- g. Responding to DEANNA COOK's call and arriving at her residence at a time considerably in excess of the time in which Defendants would have responded to a similarly situated non-minority.

- h. Refusing to immediately send assistance to DEANNA COOK's residence because of her status as a domestic violence victim, an African-American female and as a result of her residing in a "high crime-rate" area;
- i. Defendants' policy of giving less police protection or assistance to women who complain of domestic abuse;
- j. Defendants' policy of allowing officers to stop at convenience stores for personal purchases while en route to urgent domestic violence calls;
- k. Failure to conduct the type of investigation at DEANNA COOK's residence (e.g. entering the residence to look for foul play) that would have been conducted had she not been a victim of domestic abuse, a minority or a resident in a high crime area;
- l. Failure to follow the requirements listed in Art. 5.04(a) of the Code of Criminal Procedure due to Ms. Cook's minority status; and
- m. Failure to get more police employees properly trained to professionally handle 9-1-1 emergencies.

82. In addition, Defendant CITY OF DALLAS, as applicable, failed and refused to implement customs, policies, practices or procedures, and failed to train its personnel adequately on the appropriate policies, practices or procedures regarding the handling of 9-1-1 domestic violence and bodily harm calls. In so doing, Defendant CITY OF DALLAS knew that it was acting against the clear dictates of current law, and knew that as a direct consequence of their deliberate decisions, the very situation that occurred -- *i.e.*, death to the 9-1-1 caller -- in all reasonable probability would occur.

83. Defendants' actions demonstrate that before her death DEANNA COOK was the victim of purposeful discrimination, either because of her race and/or gender, or due to an irrational or arbitrary state classification unrelated to a legitimate state objective.

84. Additionally, no rational basis existed for the CITY OF DALLAS' alleged policies of affording female victims of domestic violence less police protection or assistance than other crime victims or giving these victims less investigative attention than other victims.

85. Similarly, no rational basis existed for the CITY OF DALLAS' alleged policies of affording 9-1-1 callers from high-crime areas or predominantly minority areas less police

protection or assistance than other crime victims or giving these female victims less investigative attention than other victims.

86. In addition to the conduct describe above, TONYITA HOPKINS and JOHNNYE WAKEFIELD violated Deanna Cook's rights, *inter alia*, when they failed to prioritize Ms. Cook's call, failed to notify the Manager II or Radio Room sergeant of Ms. Cook's urgent call and refused to alert dispatchers of the grave nature of the call.

87. In addition to the conduct describe above, KIMBERLEY COLE violated Deanna Cook's rights, *inter alia*, by deserting the call center, leaving it with no supervision to act in emergency matters such as the one presented by Ms. Cook's desperate call.

88. In addition to the conduct describe above, YAMINAH SHANI MITCHELL violated Deanna Cook's rights, *inter alia*, when she failed to prioritize Ms. Cook's call and refused to alert officers of the grave or urgent nature of the call.

89. In addition to the conduct describe above, officers JULIA MENCHACA and AMY WILBURN violated Deanna Cook's rights, *inter alia*, when they failed to prioritize Ms. Cook's call, made various other stops while en route to Ms. Cook's residence, refused to conduct an adequate investigation at Ms. Cook's home, refused to forcibly enter Ms. Cook's home to save her life, and abruptly left the premises while her life lay in the balance.

90. In addition to the conduct describe above, ANGELIA HEROD-GRAHAM violated Deanna Cook's rights, *inter alia*, when she failed to prioritize the call from Ms. Cook's family and refused to alert dispatchers of the grave nature of the call.

91. Upon information and belief, TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, YAMINAH SHANI MITCHELL, JULIA MENCHACA, AMY WILBURN, and ANGELIA HEROD-GRAHAM acted independently during some of the

conduct or omissions complained of herein and within the general scope of his or her employment during other conduct or inaction.

92. At the time of the conduct complained of, the CITY OF DALLAS' agents were performing ministerial, not discretionary, duties, the breach of which led to Ms. Cook's demise.

93. Additionally, to the extent she was not involved in the decision to delay Ms. Cook's response time, JOHNNYE WAKEFIELD is liable as a bystander since she (a) knew that a fellow officer was violating Ms. Cook's constitutional rights by not providing proper assistance to her, (b) had a reasonable opportunity to prevent the harm by ensuring that Ms. Cook's 9-1-1 call was properly prioritized, and (c) choose not to act.

94. Additionally, to the extent she was not involved in the decision to delay the arrival of the officers to Ms. Cook's residence, YAMINAH SHANI MITCHELL is liable as a bystander since she (a) knew that the assigned officers were violating Ms. Cook's constitutional rights by not providing proper assistance to her, (b) had a reasonable opportunity to prevent the harm by ensuring that Ms. Cook's 9-1-1 call was properly prioritized, and (c) choose not to act.

95. Furthermore, unlike what officers MENCHACA and WILBURN did, no reasonably prudent police officer, under similar circumstances, would have (a) stopped at a 7-11 convenience store to make personal purchases while en route to an urgent call; (b) arrived at the scene of a serious disturbance, where a life was threatened, and refused to survey the entire premises; (c) intentionally refused to look through the windows, where they would have noticed that a physical confrontation had taken place inside; (d) intentionally failed to forcibly gain entry into Ms. Cook's home; (e) intentionally failed to comply with Art. 5.04(a) of the Code of Criminal Procedure; and (f) refused to conduct any follow-up investigation.

96. Moreover, no reasonably competent official would have concluded that the actions of the CITY OF DALLAS, TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, YAMINAH SHANI MITCHEL, JULIA MENCHACA, AMY WILBURN, and ANGELIA HEROD-GRAHAM described herein would not violate Deanna Cook's rights. In other words, no reasonably prudent call center employee, supervisor or officer, under similar circumstances, could have believed that their conduct was justified.

97. No rational basis existed for the CITY OF DALLAS' alleged policy of affording female victims of domestic violence less police assistance than other crime victims.

98. In addition, DEANNA COOK, individually, was intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment.

COUNT TWO:
VIOLATION OF DUE PROCESS

99. Plaintiffs reallege and incorporate by reference each of the allegations set forth in all preceding paragraphs as if set forth fully and reiterated here in their entirety

100. DEANNA COOK had a protective order against the suspect who police have identified as her suspected killer. Ms. Cook had also contacted the DALLAS POLICE DEPARTMENT on several previous occasions to report that the suspect physically abused and was stalking her.

101. On one such occasion, just a week before her murder, Ms. Cook called 9-1-1 to report that the suspect was across the street from her house stalking her. The police made no arrest and filed no criminal complaint. Instead, the police simply drove the stalking suspect home.

102. The DALLAS POLICE DEPARTMENT clearly had duty to protect DEANNA COOK since the police had knowledge of specific threats of violence to her by the suspected attacker, yet refused to act to protect her.

COUNT THREE:
NEGLIGENCE AND GROSS NEGLIGENCE

103. Plaintiffs reallege and incorporate by reference each of the allegations set forth in all preceding paragraphs as if set forth fully and reiterated here in their entirety.

104. Accordingly, by their actions described herein, all of the Defendants were negligent, grossly negligent and/or acted with malice in at least the following regards:

- a. Failing to correctly prioritize DEANNA COOK's August 17, 2012, 9-1-1 call;
- b. Refusing to escalate DEANNA COOK's call to once requiring lights and sirens blaring;
- c. Refusing to respond timely to Deanna Cook's August 17, 2012, 9-1-1 call;
- d. Failure to recognize the severity of the crime that DEANNA COOK was reporting;
- e. Refusing to correctly prioritize the August 19, 2012, 9-1-1 call from DEANNA COOK's family;
- f. Failure to institute a system that would ensure that domestic violence calls receive a high priority of responsiveness;
- g. Failure to instruct and supervise Dallas Police Department employees regarding the proper evaluation of 9-1-1 calls;
- h. Failure to instruct and supervise Dallas Police Department regarding the importance of having supervisors present at the 9-1-1 call center at all times;
- i. Failure to institute adequate policies and procedures to ensure that supervisors would always be present on the floor of the 9-1-1 call center;
- j. Failure to abide by the standards of the Texas Commission on Law Enforcement Officer Standards and Education;
- k. Failure to correctly prioritize the investigation at DEANNA COOK's residence;
- l. Failure to conduct a proper search and investigation while out at DEANNA COOK's residence on August 17, 2012;

- m. Failure to follow the requirements listed in Art. 5.04(a) of the Code of Criminal Procedure;
- n. Refusing to adequately train, staff or place into practice a procedure to train for police emergency 9-1-1 calls of this sort; which as a result also contributed to the failure of the police to arrive Ms. Cook's home in time to prevent her death;
- o. Negligent implementation of existing policies;
- p. Negligent hiring, retention and assignments;
- q. Negligent supervision, training, and direction;
- r. Refusing to get more people properly trained to professionally handle the city's 9-1-1 emergencies and overworking existing call takers;
- s. Negligent failure to discipline its 9-1-1 call takers, supervisors and investigating officers;
- t. Improper or inadequate operations, technology, staffing, training, and procedures to provide proper handling of 9-1-1 calls; and
- u. Failure to properly supervise the daily decisions of DALLAS POLICE DEPARTMENT employees.

105. In addition to the above action or inaction, TONYITA HOPKINS and JOHNNYE WAKEFIELD were negligent when they failed to prioritize Ms. Cook's call, failed to notify the Manager II or Radio Room sergeant of Ms. Cook's urgent call and refused to alert dispatchers of the grave nature of the call.

106. In addition to the above action or inaction, YAMINAH SHANI MITCHELL was negligent when she failed to prioritize Ms. Cook's call and refused to alert the responding officers of the grave nature of the 9-1-1 call.

107. In addition to the above action or inaction, KIMBERLEY COLE was negligent when she left the floor of the 9-1-1 call center, leaving it with no supervision to act in emergency matters such as the one presented by Ms. Cook's desperate call.

108. In addition to the above action or inaction, Officers JULIA MENCHACA and AMY WILBURN did what no reasonably prudent police officer, under similar circumstances, would have done when they (a) stopped at a 7-11 convenience store to make personal purchases

while en route to an urgent call; (b) arrived at the scene of a serious disturbance, where a life was threatened, and refused to survey the entire premises; (c) intentionally refused to look through the windows, where they would have noticed that a physical confrontation had taken place inside; (d) intentionally failed to gain entry into Ms. Cook's home; (e) abruptly left the premises while her life lay in the balance; (f) intentionally failed to comply with Art. 5.04(a) of the Code of Criminal Procedure; and (g) refused to conduct any follow-up investigation.

109. In addition to the above actions and inaction, ANGELIA HEROD-GRAHAM failed to prioritize the call from Ms. Cook's family and refused to alert dispatchers of the grave nature of the call, thus causing Ms. Cook's family to enter a crime scene and observe their loved one dead, murdered in her own bathtub.

110. Upon information and belief, TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, YAMINAH SHANI MITCHELL, JULIA MENCHACA, AMY WILBURN, and ANGELIA HEROD-GRAHAM acted independently during some of the conduct or omissions complained of herein and within the general scope of his or her employment during other conduct or omissions.

111. No reasonably competent official would have concluded that the actions of TONYITA HOPKINS, KIMBERLEY COLE, JOHNNYE WAKEFIELD, YAMINAH SHANI MITCHELL, JULIA MENCHACA, AMY WILBURN, and ANGELIA HEROD-GRAHAM would not lead to the death of Deanna Cook. In other words, no reasonably prudent call center employee, supervisor or police officer, under similar circumstances, could have believed that their conduct was justified.

112. Defendants' conduct described above constitutes gross negligence, recklessness, and/or intentional misconduct.

COUNT FOUR:
BYSTANDER RECOVERY

113. Plaintiffs reallege and incorporate by reference the allegations set forth in all preceding paragraphs as if set forth fully and reiterated here in their entirety.

114. After the police ignored repeated pleas for assistance, Ms. Cook's family investigated the perimeter of the house, and was able to tell that something was wrong.

115. To make matters worse, instead of offering assistance, the 9-1-1 operator, ANGELIA HEROD-GRAHAM, informed the family that Ms. Cook had made a 9-1-1 call two days earlier. This sent the family into a panic.

116. After hearing this, the family kicked the patio door down to gain entry into the residence. Upon entrance, N'EYCEA WILLIAMS, ANIYA WILLIAMS, VICKIE COOK, and KARLETHA COOK-GUNDY were overcome by the stench coming from Ms. Cook's bedroom.

117. Upon walking into Ms. Cook's bathroom, N'EYCEA WILLIAMS, ANIYA WILLIAMS, VICKIE COOK, and KARLETHA COOK-GUNDY observed Ms. Cook's partially clad body laying side-ways, half-in and half-out of the bathtub, floating atop the cold overflowing water. Her body was severely discolored and skin abnormally wrinkly.

118. After finding Ms. Cook dead, ANGELIA HEROD-GRAHAM overheard Ms. Cook's family screaming in shock and agony at finding their loved one in this condition, despite all the pleas for assistance from the police.

119. N'EYCEA WILLIAMS, ANIYA WILLIAMS, VICKIE COOK, and KARLETHA COOK-GUNDY were all located near the bath tub where DEANNA COOK's body was found; their shock resulted from a direct emotional impact upon them from the sensory and contemporaneous observance of the incident; and each is closely related to DEANNA COOK, as daughters, mom and sister.

120. More than 12 minutes after her initial 9-1-1 call, Ms. Cook's mother spoke to ANGELIA HEROD-GRAHAM again whereupon Ms. Cook stated "my baby is in the tub dead." After the police finally arrived, DEANNA COOK's body was taken directly to the morgue.

121. N'EYCEA WILLIAMS, ANIYA WILLIAMS, VICKIE COOK, and KARLETHA COOK-GUNDY all suffered direct personal injury in form of mental anguish and emotional distress from entering a crime scene (since police wouldn't) and witnessing Ms. Cook's dead body after police failed to intervene to save her life and refused to discover her body, which could have prevented Ms. Cook's family from having to observe the horrific condition of their loved one.

COUNT FIVE:
WRONGFUL DEATH

122. Plaintiffs reallege and incorporate by reference the allegations set forth in all preceding paragraphs as if set forth fully and reiterated here in their entirety.

123. Plaintiffs bring this wrongful death claim against Defendants pursuant to Texas Civil Practice & Remedies Code sections 71.001-71.012.

124. Plaintiff VICKIE COOK is a statutory beneficiary of DEANNA COOK and relied on her for love, affection, comfort, financial assistance, protection, affection and care.

125. Plaintiff VICKIE COOK is also acting as Guardian and Next Friend of minor children Plaintiffs' N'EYCEA WILLIAMS AND ANIYA WILLIAMS, both of whom are statutory beneficiaries of DEANNA COOK and relied on her for love, affection, comfort, financial assistance, protection, affection and care.

126. Plaintiff KARLETHA COOK-GUNDY is the executor/administrator of the Estate of DEANNA COOK.

127. Defendants' wrongful acts caused the death of DEANNA COOK.

128. DEANNA COOK would have been entitled to bring an action for her injuries had she lived.

129. As a proximate result of Defendants' conduct, which caused the untimely death of DEANNA COOK, Plaintiffs are entitled to recover, in excess of the minimum jurisdictional limits of this Court.

COUNT SIX:
SURVIVAL ACTION

130. Plaintiffs reallege and incorporate by reference the allegations set forth in all preceding paragraphs as if set forth fully and reiterated here in their entirety.

131. Plaintiffs bring this survival action claim against Defendants pursuant to Texas Civil Practice & Remedies Code Sections 71.021-71.022.

132. Plaintiff KARLETHA COOK-GUNDY is the legal representative of the estate of DEANNA COOK. Prior to her death, DEANNA COOK had a survival action for herself. KARLETHA COOK-GUNDY is appearing in the survival action as the legal representative of the estate of DEANNA COOK.

133. Plaintiff VICKIE COOK is a statutory beneficiary of DEANNA COOK and relied on her for love, affection, comfort, financial assistance, protection, affection and care.

134. Plaintiff VICKIE COOK is also acting as Guardian and Next Friend of minor children Plaintiffs' N'EYCEA WILLIAMS AND ANIYA WILLIAMS, both of whom are statutory beneficiaries of DEANNA COOK and relied on her for love, affection, comfort, financial assistance, protection, affection and care.

135. Defendants' wrongful acts led to DEANNA COOK's death.

136. As a proximate result of Defendants' conduct, which led to the untimely death of DEANNA COOK, Plaintiffs are entitled to recover, in excess of the minimum jurisdictional limits of this Court.

DAMAGES– ALL DEFENDANTS

137. Defendants' acts and/or omissions were a proximate cause of the following injuries suffered by Plaintiffs and decedent:

- a. Actual damages;
- b. Loss of affection, consortium, comfort, financial assistance, protection, affection and care;
- c. Pain and suffering and mental anguish suffered by DEANNA COOK prior to her death;
- d. Mental anguish and emotional distress suffered by Plaintiffs;
- e. Loss of quality of life;
- f. Funeral and burial expenses;
- g. Loss of service;
- h. Loss of earnings and contributions to Plaintiffs;
- i. Exemplary and punitive damages as well as reasonable attorneys' fees and costs of court;
- j. Pursuant to 42 U.S.C. §1988, and other applicable laws, Plaintiffs should be awarded reasonable attorney's fees for the preparation and trial of this cause of action, and for its appeal, if required;
- k. Prejudgment interest; and
- l. Post judgment interest.

138. Plaintiffs seek unliquidated damages in an amount that is within the jurisdictional limits of the court.

EXEMPLARY DAMAGES

139. Plaintiffs seek exemplary damages for injuries caused by Defendants' gross negligence under Texas Civil Practice & Remedies Code section 41.003(a)(3), as defined by Section 41.001(11). Plaintiffs also seek exemplary damages for the wrongful death of the

decendent caused by Defendants' willful act or omission or gross neglect, as provided in Texas Constitution, article 16, section 26, and Texas Civil Practice & Remedies Code section 71.009. Finally, Plaintiffs seek exemplary damages under any and all other statutes, acts, or law providing for such damages.

CONDITIONS PRECEDENT

140. Defendants have actual notice of DEANNA COOK's death and injuries complained of herein. Any conditions precedent have occurred, been performed, or have been waived.

DEMAND FOR JURY

141. Plaintiffs hereby make demand for a jury trial.

PRAYER

Wherefore, Premises Considered, Plaintiffs pray that Defendants be cited to appear and answer herein and, upon final trial hereof, that Plaintiffs have and recover from Defendants the Plaintiffs' actual damages, exemplary damages, pre and post-judgment interest, costs of court, attorneys' fees, and such other and further relief, both general and special, at law and in equity, to which they may be justly entitled.

Respectfully Submitted,

/s/ Aubrey "Nick" Pittman
AUBREY "NICK" PITTMAN
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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2012 the foregoing pleading was filed with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to all attorneys of record who have consented in writing to accept this Notice as service of documents by electronic means.

/s/ Aubrey “Nick” Pittman
AUBREY “NICK” PITTMAN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VICKIE COOK, Individually and as	§	
Natural Mother to DEANNA COOK, et al.,	§	
Plaintiffs,	§	CIVIL ACTION NO.
	§	
v.	§	3:12-CV-3788-L
	§	ECF
THE CITY OF DALLAS;	§	
THE CITY OF DALLAS POLICE	§	
DEPARTMENT; et al.,	§	
Defendants.	§	

**DEFENDANT DALLAS POLICE DEPARTMENT’S RULE 12(b)(6)
MOTION TO DISMISS, AND BRIEF IN SUPPORT**

TO THE HONORABLE COURT:

Defendant Dallas Police Department (“DPD”), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and N. D. Local Civil Rules LR 7.1 and LR 7.2, requests the Court to issue an order dismissing all of Plaintiffs’ claims against the DPD because the DPD is a non-jural entity and does not have the capacity to be sued.

I. BACKGROUND AND RELEVANT PROCEDURAL HISTORY

1.1 Plaintiffs’ claims arise from the handling of a “9-1-1” assistance call by Deanna Cook, deceased (“Cook”) on 17 August 2012. In summary, Plaintiffs’ complaint alleges that the City of Dallas (the “City”), the DPD, and various City employees mishandled Cook’s 9-1-1 call, which resulted in Cook’s death at the hands of a non-governmental assailant. Plaintiffs’ complaint asserts constitutional claims arising under the 14th Amendment, and survival and wrongful death actions arising under Texas law. (*See generally* Plaintiffs’ Original Complaint) (ECF #1)) (the “Complaint”). Plaintiffs bring suit against both “the City of Dallas” and “the City of Dallas Police Department.” (*See* Complaint at PageID 1-2, 3-4 ¶¶ 9, 10.)

1.2 Plaintiffs filed the civil action on 19 September 2012. (*See* Court’s Docket.) That same day the Dallas city secretary was served with a copy of the Complaint and a summons to “The City of Dallas Police Department.” (*See* ECF #4 at PageID 47.)

II. ARGUMENT AND AUTHORITIES

2.1 Rule 17 of the Federal Rules of Civil Procedure states that the capacity of an entity to be sued shall be determined by the law of the state in which the district court is seated.

2.2 Because the City of Dallas is a home rule municipality, Texas law grants the City the authority to organize a police force. Tex. Loc. Gov’t Code Ann. Section 341.003 (Vernon 1999 & Supp. 2004).

2.3 The Dallas City Charter states that the City may sue and be sued, but does not grant the same capacity to the DPD. *See* Dallas City Charter Chap. II Section 1(2).

2.4 Plaintiffs plead that “[t]he CITY OF DALLAS funds and operates the CITY OF DALLAS POLICE DEPARTMENT.” (Complaint at PageID 3-4 ¶ 10.) However, Plaintiffs do not plead that the DPD is a legal entity separate and apart from the City itself. (*See generally*, Complaint.)

2.5 Because the City Charter does not give the DPD the power to sue or be sued, Plaintiffs may not bring suit against the DPD, since it has no legal existence. *Darby v. Pasadena Police Dep’t*, 939 F.2d 311, 313 (5th Cir. 1991) (dismissing a claim against a municipal police department under rule 12(b)(6) because the police department was a non-jural entity); *Vardas v. City of Dallas*, 54 F. App’x 592, at *1 (5th Cir. 2002) (unpublished) (affirming the dismissal of Dallas Police Department Property Room as non-jury entity, citing *Darby*).

2.6 This Court routinely dismisses section 1983 claims made against the Dallas Police Department on this basis. *See, e.g., Johnson v. Dallas City Police Dep’t*, No. 3:04-CV-1578-B,

2004 WL 2964968, at *2 (N.D. Tex. Dec. 15, 2004) (Fitzwater, C.J.), *rec. adopted*, 2005 WL 119467 (N.D. Tex. Jan. 18, 2005) (Dallas Police Department not a proper defendant with a jural existence, citing *Darby*); *Mugweni v. Wachovia, Inc.*, No. 3:08-CV-1524-G (N.D. Tex. Jan. 5, 2009) (Fish, S.J.) (same); *Al-Saraji v. City of Dallas*, No. 3:10-CV-1918-O (N.D. Tex. Nov. 12, 2010) (O'Connor, J.) (same). Therefore, the Court should grant this motion to dismiss for failure to state a claim upon which relief can be granted.

WHEREFORE, Defendant Dallas Police Department respectfully requests that the Court enter an order dismissing with prejudice Plaintiffs' claims against the Dallas Police Department, and further granting all other relief consistent with this motion.

Respectfully submitted,

THOMAS P. PERKINS, JR.
Dallas City Attorney

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ATTORNEYS FOR DEFENDANT
DALLAS POLICE DEPARTMENT

CERTIFICATE OF SERVICE

I certify that on 20 September 2012 I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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Attorneys for Plaintiffs

s/ Jason G. Schuette
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

VICKIE COOK, Individually and as	§	
Natural Mother to DEANNA COOK, et al.,	§	
Plaintiffs,	§	CIVIL ACTION NO.
	§	
v.	§	3:12-CV-3788-P
	§	ECF
THE CITY OF DALLAS, et al.,	§	
Defendants.	§	

**DEFENDANT CITY OF DALLAS’S MOTION TO DISMISS PLAINTIFFS’
STATE LAW CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS,
AND BRIEF IN SUPPORT**

TO THE HONORABLE COURT:

Defendant City of Dallas (the “City”) files its motion to dismiss Plaintiffs’ state law claims against the individual defendants, Tonyita Hopkins, Kimberley Cole, Johnnye Wakefield, Yaminah Shani Mitchell, Julia Menchaca, Amy Wilburn, and Angelia Herod-Graham (referred to collectively as the “Individual Defendants”).

I. SUMMARY OF MOTION

Plaintiffs plead federal and state claims against the Individual Defendants. In addition to Plaintiffs’ federal claims brought pursuant to 42 U.S.C. § 1983 for alleged deprivations of rights secured by the Fourteenth Amendment, Plaintiffs sue the City and the Individual Defendants under this Court’s supplemental jurisdiction for tort claims arising from the death of Deanna Cook (“Cook”), as follows: a wrongful death claim, a survival claim, infliction of emotional distress claim, and for damages resulting from negligence, gross negligence, recklessness, and/or intentional misconduct. Pursuant to the Texas Election of Remedies Statute, Texas Civil Practice and Remedies Code section 101.106(e), the City moves the Court immediately to dismiss Plaintiffs’ state law claims against the Individual Defendants.

II. RELEVANT PROCEDURAL HISTORY

2.1 Plaintiffs filed this suit on 19 September 2012, seeking monetary damages against the City and the Individual Defendants. In an apparent response to a rule 12(b)(6) motion by the City of Dallas Police Department filed on 20 September 2012 (ECF #6), that same day Plaintiffs filed their live complaint, Plaintiffs' First Amended Complaint (ECF #8) (the "Complaint"), which omits the Dallas Police Department as a defendant.¹ (*See* Court's Docket.)

2.2 Plaintiffs caused the City to be served with a summons and a copy of the Complaint on 20 September 2012. (*See* ECF #4; Court's Docket.) The City has not yet filed an answer or rule 12 motion in response to the Complaint. (*See* Court's Docket.)

2.3 The Court has not entered a scheduling order. (*See* Court's Docket.)

III. ARGUMENT AND AUTHORITIES IN SUPPORT OF MOTION

A. The Texas Tort Claims Act and Texas' Election of Remedies Statute

Like many states, Texas has enacted a limited statutory waiver of its sovereign immunity. *See* Texas Civil Practice and Remedies Code, chapter 101, the Texas Tort Claims Act ("TTCA"). Because plaintiffs frequently sought to avoid the restrictions imposed by the TTCA by suing government employees, in 1985 the Texas Legislature enacted an election of remedies provision that barred any action by a claimant against a government employee whose act or omission gave rise to the claim where there is a judgment or a settlement of a claim involving the same subject matter.² However, as the Texas Supreme Court noted in *Mission Consolidated Independent*

¹ Plaintiffs caused to be served to the Dallas city secretary a summons directed to "the City of Dallas Police Department." (*See* ECF #4 at PageID 47.) The Dallas Police Department's rule 12(b)(6) motion was premised upon the fact that, as a matter of law, the Dallas Police Department is not a jural entity that is capable of being sued. (*See* ECF #6.) In light of the omission of the Dallas Police Department from the live Complaint, on 21 September 2012 the Dallas Police Department filed a notice that it withdraws its rule 12(b)(6) motion (ECF #9).

² *See* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3305, which provided that "[a] judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of a governmental unit whose act or omission gave rise to the claim."

School District v. Garcia, 253 S.W.3d 653 (Tex. 2008), the 1985 amendment still did not prevent plaintiffs from pursuing alternative theories against both the governmental unit and its employees prior to obtaining a judgment or reaching a settlement. *Mission*, 253 S.W.3d at 655-56. Consequently, governmental units and their employees were required to expend considerable resources defending redundant claims brought under alternative theories of recovery.

As part of Texas' comprehensive effort in 2003 to reform its tort system, the Legislature amended section 101.106 of the TTCA, entitled "Election of Remedies." Section 101.106(e) now provides:

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.³

For the Court's convenience, the City attaches a copy of section 101.106 to this motion.

"Section 101.106 . . . is designed to force a plaintiff to decide at the outset whether an employee acted independently, and is thus solely liable, or whether she acted within the general scope of her employment so that the governmental unit is vicariously liable." *City of Arlington v. Randall*, 301 S.W.3d 896, 903 (Tex. App.—Fort Worth 2009, pet. denied) (citing *Mission*, 253 S.W.3d at 657). By requiring a plaintiff to make an irrevocable election at the time suit is filed between suing the governmental unit under the TTCA or proceeding against the employee alone, section 101.106 narrows the issues for trial and reduces delay and duplicative litigation costs.⁴ *Texas Bay Cherry Hill, L.P. v. City of Fort Worth*, 257 S.W.3d 379, 398 (Tex. App.—Fort Worth

³ Per section 101.106(e), the City is the proper movant because it is the governmental unit that is/was the employer of the Individual Defendants.

⁴ All tort theories alleged against a governmental entity, including intentional torts, and without regard to whether the governmental entity is sued alone or together with its employees, are assumed to be "under" the TTCA for purposes of section 101.106. See *Mission*, 253 S.W.3d at 656-57 (citing *Newman v. Obersteller*, 960 S.W.2d 621, 622 (Tex. 1997)).

2008, no pet.) (citing *Mission*, at 656-57).

Here, Plaintiffs attempt to straddle those choices in precisely the manner that the statute seeks to prevent. Paragraph 12 of the Complaint asserts that the City “is the employer of [the Individual Defendants] and is responsible for the acts and/or omissions of same that were performed in the course and scope of their employment.” (Complaint at PageID 64.) However, in paragraph 91, Plaintiffs plead that the Individual Defendants “acted independently during some of the conduct or omissions complained of herein and within the general scope of his or her employment during other conduct or inaction.” (Complaint at PageID 78-79.) Plaintiffs repeat that allegation within their “Negligence and Gross Negligence” claim (paragraph 110 (Complaint at PageID 83)). As discussed below, Plaintiffs incorporate those allegations by reference in each of their four tort claims arising under Texas law.

Section 101.106(e) of the TTCA is unconditional and mandatory. So long as a plaintiff files suit against both the governmental entity and its employee(s), a court *must immediately dismiss* the employee(s) upon the filing of a motion such as this. A governmental entity perfects the statutory right to dismissal of its employees upon the filing of a motion to dismiss. *Randall*, 301 S.W.3d at 903. A plaintiff cannot alter his election of remedies by amending his complaint. Once a plaintiff pleads her tort claims against a governmental entity, its employee, or both, her election is irrevocable and cannot be altered by an amended complaint. *See, e.g., Randall*, 301 S.W.3d at 903 (“Even if the plaintiff amends his petition after the government files a motion to dismiss, the amended petition does not moot the right created by the filing of a motion under section 101.106.”); *Brown v. Ke-Ping Xie*, 260 S.W.3d 118, 121-22 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (holding that the plaintiff’s original petition, not his amended petition, controls whether dismissal of the employees under section 101.106(e) is appropriate); *Villasan v.*

O'Rourke, 166 S.W.3d 752, 762 (Tex.App.—Beaumont 2005, pet. denied) (concluding that if dismissal of a government employee is appropriate based on the original petition, the filing of an amended petition does not avoid the mandatory language of section 101.106(e), and stating that “the trial judge’s duty to dismiss the government’s employee [is] mandatory when the government files a motion requesting that the claims against its employee be dismissed”).

B. Section 101.106(e) Applies to Plaintiffs’ Texas Common Law and Statutory Claims Against the Individual Defendants.

Here, Plaintiffs filed their Texas state law negligence, “bystander,” wrongful death, and survival claims against both the City and the Individual Defendants. Plaintiffs named the City and the Individual Defendants in their original complaint. (*See* Plaintiffs’ Original Complaint at 1-2, 3-4 (ECF #1 at PageID 1-2, 3-4) ¶¶ 2, 11-13.) Plaintiffs’ live Complaint continues to name both the City and the Individual Defendants. (*See* Complaint at 1-2, 3-4 (ECF #8 at PageID 61-62, 63-64) ¶¶ 11-13.) Because the live Complaint with respect to the state law tort claims is a verbatim copy of Plaintiffs’ original complaint in every respect other than pagination and the certificate of service, the remainder of this motion will refer to the live Complaint.

Plaintiffs plead four claims arising under Texas common law or Texas statutory law: a “negligence and gross negligence” claim (Complaint at PageID 81-83 ¶¶ 103-12); an apparent claim for negligent infliction of emotional distress, labeled as a claim for “Bystander Recovery” (Complaint at PageID 84-85 ¶¶ 113-121); a wrongful death claim, pursuant to Texas Civil Practice and Remedies Code sections 71.001-71.012 (Complaint at PageID 85-86 ¶¶ 114-29); and a survival action, pursuant to Texas Civil Practice and Remedies Code sections 71.021-71.022 (Complaint at PageID 86-87 ¶¶ 130-36).

1. Plaintiffs’ claims for “Negligence and Gross Negligence”

Paragraph 103 of the Complaint “reallege[s] and incorporate[s] by reference each of the

allegations set forth in all preceding paragraphs” of the Complaint. (Complaint at PageID 81.) Paragraph 104 pleads that “all of the Defendants were negligent, grossly negligent and/or acted with malice.” (*Id.*) Paragraph 104 contains subparagraphs “a” through “u”, which enumerate the means by which Plaintiffs assert that the City and its employees were negligent. (*Id.* at PageID 81-82.) The negligence alleged in those subparagraphs plainly embraces actions by both the City and the Individual Defendants.

2. Plaintiffs’ claims for “Bystander Recovery”

Paragraph 113 of the Complaint similarly reincorporates all of the preceding paragraphs of the Complaint. (Complaint at PageID 84.) Although cast as a claim for “bystander recovery,” Plaintiffs’ claim is actually for negligent infliction of emotional distress.⁵ Nonetheless, however this claim is classified, Plaintiffs bring it against both the City and the Individual Defendants.

3. Plaintiffs’ claim for “Wrongful Death”

This claim is brought by Cook’s children and parents, who are among the class of persons who may bring a wrongful death action, per Texas Civil Practice and Remedies Code section 71.004. Paragraph 122 of the Complaint again reincorporates all of the preceding paragraphs of the Complaint. (Complaint at PageID 85.) As before, Plaintiffs’ allege that both the City and the Individual Defendants are liable for Cook’s death. (*See* Complaint at PageID 85-86 ¶¶ 123-29.)

4. Plaintiffs’ “Survival Action” claim

Plaintiffs’ survival action is brought by Cook’s heirs, legal representatives, and/or estate, who are among the class of persons who may bring a claim for personal injuries suffered by a deceased person pursuant to Texas Civil Practice and Remedies Code section 71.021. Paragraph

⁵ To the extent that Plaintiffs assert a right to recover for negligent infliction of emotional distress, that claim must fail regardless of the identity of the defendant(s). The Texas Supreme Court held in *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993), that there is no general duty not to negligently inflict emotional distress. *Boyles*, 855 S.W.2d at 597. Plaintiffs plead no facts to support intentional infliction of emotional distress. (*See generally* Complaint.)

130 of the Complaint once again reincorporates all of the preceding paragraphs of the Complaint. (Complaint at PageID 86.) And, as before, Plaintiffs allege that both the City and the Individual Defendants are liable for Cook's death. (See Complaint at PageID 86-87 ¶¶ 131-36.)

5. The Court must dismiss Plaintiffs' Texas tort claims as to the Individual Defendants without delay.

Clearly, Plaintiffs' Texas tort claims are alleged against both the City and the Individual Defendants; that is, against both the governmental unit and its employees. Therefore, section TTCA 101.106(e) applies, and the Individual Defendants must be dismissed immediately upon the filing of this motion. As explained above, amendment of the Complaint would be futile. For these reasons, the Court must grant without delay the City's motion to dismiss Plaintiffs' Texas common-law and statutory tort claims as to the Individual Defendants.

WHEREFORE, the City of Dallas requests that the Court enter without delay an order dismissing Plaintiffs' Texas common law and statutory tort claims pleaded against the Individual Defendants, and for all such other relief that is consistent with this motion.

Respectfully submitted,

THOMAS P. PERKINS, JR.
Dallas City Attorney

s/ Jason G. Schuette
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ATTORNEYS FOR DEFENDANT
CITY OF DALLAS

CERTIFICATE OF SERVICE

I certify that on 25 September 2012 I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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