Case No. 20-40580

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES "CHAD" YORK, INDIVIDUALLY, SANDY LYNN WINFREY YORK, INDIVIDUALLY, LOREAL FULTZ, AS INDEPENDENT ADMINISTRATOR OF, AND ON BEHALF OF, THE ESTATE OF CHAZ LOGAN YORK AND HIS HEIRS-IN-LAW
Plaintiffs-Appellants

v.

CHASE AARON WELCH, THE CITY OF BEAUMONT
Defendants-Appellees

On Appeal from the United States District Court for the Eastern District of Texas, Beaumont Division

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OPENING BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

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

Plaintiff-Appellants: James "Chad" York & Loreal Fultz, as Independent Administrator of The Estate of Chaz Logan York & Heirs-in-Law	**Counsel for Plaintiff-Appellants** D. Clinton Brasher Nishi Kothari Joseph Muckleroy Brasher Law Firm, PLLC
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/s/ Nishi Kothari
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants, James "Chad" York, individually, Sandy Lynn Winfrey York, individually, and Loreal Fultz, as Independent Administrator of, and on behalf of, the Estate of Chaz Logan York and his heirs-in-law, do not request oral argument, as appellants do not believe that this case involves novel or new questions of law.

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I. JURISDICTIONAL STATEMENT

Plaintiffs-Appellants, James "Chad" York, individually, Sandy Lynn Winfrey York, individually, and Loreal Fultz, as Independent Administrator of, and on behalf of, the Estate of Chaz Logan York and his heirs-in-law, brought this civil action against The City of Beaumont, under 42 U.S.C. §1983, seeking relief for violations of their rights under the 4th and 14th Amendments of the United States Constitution. The district court had subject matter jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1343. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291 because Plaintiffs-Appellants seek review of a final decision of the district court that disposed of all the parties' claims.

This appeal is timely. The district court entered judgment dismissing Plaintiffs-Appellants' claims in full on August 3, 2020.[1] Plaintiffs-Appellants timely filed their notice of appeal on August 31, 2020.[2]

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Whether the district court erred in granting the City of Beaumont's motion to dismiss despite the fact that it was untimely, and whether the district court erred in converting the City of Beaumont's motion to dismiss to a judgment on the pleadings when there were material facts in dispute.

[1] *See* ROA.531.
[2] *See* ROA.532-536. *See* FED. R. APP. P. 4(a)(1).

2) Whether the district court erred in finding that Plaintiffs-Appellants had not sufficiently pled any viable §1983 claim(s) against the City of Beaumont
3) Whether the district court erred in finding that Plaintiffs-Appellants were not entitled to their request for attorney's fees pursuant to 42 U.S.C. §1983.

III. STATEMENT OF THE CASE

This case stems from the shooting and killing of an unarmed 23-year old young man, Chaz York, by an off-duty Beaumont Police Department officer, Chase Welch, in the parking lot of a local bar and restaurant in Beaumont, TX. Despite the fact that Chaz York was not suspected of any crime, put under arrest, nor given no commands to "stop" or "freeze" or put his hands in the air, Officer Welch shot him multiple times, killing him instantly.

A. Procedural History

This appeal relates to the district court's ruling affirming the City of Beaumont's FED. R. CIV. P. 12(b)(6) Motion to Dismiss, which dismissed Plaintiffs-Appellants' §1983 claims and request for attorney's fees against the City of Beaumont.[3] The district court held that Officer Welch used unreasonable excessive force against Chaz York and that Officer Welch was not entitled to qualified immunity at this stage.[4] These issues are not contested.[5] The primary issues relate

[3] ROA.531; *see generally*, ROA.451-490.
[4] *See* ROA.395, 461.
[5] Defendant-Appellee has not filed a cross notice of appeal on this issue.

to whether or not Plaintiffs-Appellants have stated viable §1983 claims against the City of Beaumont.

B. The City of Beaumont knew that Officer Welch had a pattern of using excessive force prior to his shooting of Chaz York, and failed to discipline him, ratifying his conduct instead

Even prior to his hiring, the City of Beaumont knew that Officer Welch had been arrested and/or detained. In 2007, just 4 years prior to his employment with the City of Beaumont, he was arrested for fighting.[6] In 2008, he was arrested in Beaumont for being a suspicious person.[7]

Officer Welch's history with the Beaumont Police Department is littered with disciplinary actions due to his aggressive behavior and/or past incidents of using excessive force. For example, he was disciplined for improperly using force by ramming his patrol car into a fleeing suspect, thereby using lethal force against a civilian.[8] In his write-up, the Chief of the Beaumont Police Department stated that there was "not sufficient justification" for him to use lethal force and take matters into his own hands.[9] But the Beaumont Police Department did not see it fit for him to be terminated from his position due to this use of excessive force. He was also disciplined for damaging his laptop and/or computer equipment, lied about the

[6] ROA.277
[7] *Id.*
[8] ROA.285.
[9] *Id*.

reason he damaged the equipment, and then later admitted that he got angry regarding other disciplinary issues and took it out on the computer.[10] And on March 26, 2015, he was suspended for causing a wreck and damaging a City of Beaumont vehicle.[11]

In August 2012, he held a civilian at gunpoint, while this civilian was walking his dog home, and threatened to shoot the dog.[12] The City of Beaumont took no action against him.[13] On March 5, 2016, just 7 months prior to his shooting and killing of Chaz York, he shot and killed Herbert Ballance, from long range, in the mouth, with a patrol rifle.[14] Once again, the City took no action against him.

C. The City of Beaumont had knowledge of the widespread and persistent use of excessive force by its officers, which became so common place as to constitute a custom and/or policy of the municipality

From March 2008 – March 2018, in a ten year period, 26% of all complaints made about the City of Beaumont by citizens related to "unauthorized use of force" or "unreasonable use of force" claims.[15] This translates to 30/112 complaints.[16] Furthermore, approximately 8% of all administrative complaints against the City of Beaumont in the same time period relates to "use of force" or "unauthorized use of

[10] *Id*.
[11] *Id*.
[12] ROA.286
[13] *Id*.
[14] *Id*.
[15] ROA.290-291.
[16] ROA.291.

force".[17]

More than half of the complaints by citizens against the City of Beaumont go unheeded, as the City of Beaumont decided to either exonerate its officers or sustain the complaints.[18] The actual percentage of claims in this time period that were sustained was only 18.75%.[19] This exhibits a tolerance by the City of Beaumont of its officers misconduct regarding unauthorized use of force, which leads its officers to believe they can act with impunity.[20]

D. The City of Beaumont's failure to train its officers on non-lethal options created a policy and/or custom wherein the City of Beaumont expected its officers to use lethal force as a first resort, instead of a last resort

The City of Beaumont has a policy and/or custom that it does not authorize its off duty officers, like Officer Welch in this case, to carry non-lethal assistive devices, like a Taser, unless the officer is engaged in police-related outside employment (like a security guard).[21] But, the City of Beaumont does have a policy or custom of allowing its officers to carry firearms when off duty, even when dressed in plain clothes, like in the case at hand.[22] Therefore, if the City of Beaumont's officers were to use any force off duty, the only choice, in accordance with the City of Beaumont's own policies and customs is lethal force. This is confirmed by the Chief Singletary's

[17] ROA.292.
[18] *Id*.
[19] *Id*.
[20] ROA.292.
[21] *Id*.
[22] *Id*.

interview with the media after the shooting of Chaz York on October 14, 2016, wherein he stated "[o]ur officers don't carry tasers off duty."[23]

Furthermore, the City of Beaumont has a policy and/or custom in which its officers are trained to shoot to kill, and not to shoot to injure. As Chief Singletary further confirmed when speaking about the Chaz York incident: "[o]fficers are not taught to shoot at an arm or a leg…"[24] In this specific case, everyone agrees that Chaz York did not have a gun on his person and as such was unarmed.[25] Thus, the City of Beaumont failed to train its officers to find less deadly measures when shooting at an unarmed citizen.

Moreover, Officer Welch is a trained expert marksman that served in the U.S. Marine Corp for 2 years as an infantry rifleman.[26] He has experience in "close combat" and can operate handguns, rifles, Squad Automatic Weapons, and grenades.[27] The two classes that the City of Beaumont gave him the most instruction in were "basic patrol rifle course" and "active shooter".[28] And despite having a taser certification, the City of Beaumont did not allow Chase Welch to carry a taser as an

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[23] *See* "Police Chief Supports Officer after Shooting" KFDM.com Oct. 18, 2016 *available at* https://kfdm.com/news/local/police-chief-supports-officer-after-shooting (last accessed Oct. 31, 2020); *see* ROA.293 (the citation for this website was incorporated in Plaintiffs' First Amended Complaint and is therefore not extrinsic evidence).
[24] *Id*.
[25] *Id*.; ROA.280, 282, 296.
[26] ROA.276-277.
[27] ROA.277.
[28] ROA.287.

off duty officer.[29] In fact, there are no classes that the City of Beaumont gave Officer Welch on non-lethal weapons or non-lethal use of force while off duty.

Moreover, the City of Beaumont failed to adequately train Officer Welch on using non-lethal weapons like batons or chemical spray, failed to provide training for appropriate responses for off-duty officers, failed to provide training on non-lethal self-defense measure, failed to provide training for proper use of crisis intervention techniques, and failed to provide training for limited use of excessive or deadly force.[30] Reviewing the training courses that Officer Welch had with the City of Beaumont, not one of the classes / training relates to alternative non-lethal weapons, crisis intervention techniques, diffusing tense situations, non-lethal self-defense, or using non-lethal weapons while off duty.[31]

E. The City of Beaumont tolerated a code of silence that fostered a permissive attitude towards the use of excessive force against civilians

The City of Beaumont also exhibited a policy and/or custom of allowing a "code of silence" amongst its officers to cover up officers' use of excessive force, like that of Officer Welch against Chaz York, by fabricating accounts to the media, intimidating / harassing witnesses into giving false testimony, and/or in internal affairs' investigations.[32] One of the primary sources of contention in the Chaz York

[29] ROA.287-88.
[30] ROA.294.
[31] ROA.287.
[32] ROA.293.

shooting was whether or not Chaz York had a baseball bat, and was swinging the same towards Officer Welch. Chaz York was the manager of a local softball team.[33] As such, he would have softball gear in the trunk of the car, including softballs, gloves and bats.[34] The City of Beaumont tried to use this evidence to manufacture a story that Chaz York was swinging a bat and banging it on the ground before Officer Welch shot and killed him.[35]

When Officer Welch approached Chaz York, there was a witness with him, who was helping Chaz York get into the car and get away from the bar.[36] This friend never saw Chaz with a bat of any kind.[37] Several witnesses came forward and informed the cops that they saw the entire encounter and there was no bat.[38] These witnesses gave statements to the City of Beaumont, but they were not presented as witnesses to the grand jury.[39] When witnesses told the City of Beaumont that they did not see Chaz York acting in a threatening manner, the City of Beaumont accused the witnesses of lying and tampering with evidence.[40] The friend who was trying to

[33] ROA.276.
[34] ROA.282.
[35] ROA.293, 310-11. *See also* "Police Chief Supports Officer after Shooting" KFDM.com Oct. 18, 2016 *available at* https://kfdm.com/news/local/police-chief-supports-officer-after-shooting (last accessed Oct. 31, 2020) (noting that Chief Singletary contends that "York had a bat and went toward the off-duty officer").
[36] ROA.280.
[37] *Id.*
[38] *Id*.
[39] ROA.282.
[40] ROA.285.

drive Chaz York away in a peaceful manner was accused by the City of Beaumont of placing the bat in the trunk.[41]

The official City of Beaumont line after the killing of Chaz York was that Chaz York was "creating a disturbance" and part of a group that created a disturbance.[42] This is despite the fact that the manager of the restaurant / bar, who was there that night, did not believe that Chaz York was being violent in any way, and did not believe that he did anything to warrant throwing him out of the bar.[43] The City of Beaumont refused to release the 911 tapes and videos from the restaurant to local news stations to figure out their own reporting and account of what transpired that night.[44] And at the same time, the City of Beaumont controlled the reporting as it misrepresented to the public what transpired that night.[45]

By allowing a policy or custom of a "code of silence" amongst its officers' use of excessive force, the City of Beaumont exhibited a policy and/or custom of covering up constitutional violations by its officers.[46]

IV. SUMMARY OF ARGUMENT

The City of Beaumont's 12(b)(6) motion to dismiss Plaintiffs'-Appellants'

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[41] *Id*.
[42] ROA.283-84, 293. *See also* "Police Chief Supports Officer after Shooting" KFDM.com Oct. 18, 2016 *available at* https://kfdm.com/news/local/police-chief-supports-officer-after-shooting (last accessed Oct. 31, 2020).
[43] ROA.283-84.
[44] ROA.284.
[45] *Id.*
[46] ROA.293.

First Amended Complaint was untimely, and incorrectly converted to a Rule 12(c) motion for judgment on the pleadings, despite the fact that there were disputed material facts at issue. Moreover, the City of Beaumont failed to preserve its defense to raise as 12(b)(6) in any of its responsive pleadings. As such, as a procedural matter, the motion to dismiss should have been denied, and the district court erred in 1) granting the motion and 2) converting it to a 12(c) motion.

Regardless, Plaintiffs'-Appellants' facts show that Chief Singletary was the official policymaker for the City of Beaumont, and that the City of Beaumont adopted policies and/or customs relating to 1) not allowing its off duty officers to use non-lethal weapons; 2) training its officers to shoot to kill instead of shoot to injure; 3) use of excessive force; 4) failing to implement any training for its officers, including Officer Welch on non-lethal weapons or use of force when off duty; 5) adopting a "code of silence" that included covering up and/or fabricating stories when officers used excessive force; and 6) ratifying and/or failing to supervise / discipline Officer Welch for past instances of excessive force. These policies show a deliberate indifference to the constitutional rights of the public. These policies and/or customs were moving forces to the infringement of Chaz York's 4th and 14th Amendment rights and/or constitutional violations.

As such, when taking the facts in a light most favorable to Plaintiffs-Appellants, it is clear that Plaintiffs-Appellants have articulated viable §1983 claims

for municipal liability to attach to the City of Beaumont in this case and the district court erred in granting the City of Beaumont's motion to dismiss and/or motion for judgment on the pleadings.

V. ARGUMENT

The district court erred in dismissing Plaintiffs-Appellants' claims against the City of Beaumont. *First*, it erred in dismissing Plaintiffs'-Appellants' claims against the City of Beaumont because the City of Beaumont's Motion to Dismiss was untimely filed and as a procedural matter should have been denied. *Second*, it erred in dismissing Plaintiffs'-Appellants' 42 U.S.C. §1983 claims against the City of Beaumont because Plaintiffs-Appellants stated a valid claim for relief in their first amended complaint against the City of Beaumont. *Third*, it erred in dismissing Plaintiffs'-Appellants' request for attorney's fees as Plaintiffs-Appellants stated a valid claim for relief pursuant to 42 U.S.C. §1983 and as such would be entitled to attorney's fees if successful at a trial on the merits of their claim.

A. Standard of Review and applicable legal standards

A district court's ruling on a motion to dismiss pursuant to 12(b)(6) or 12(c) is subject to *de novo* review. *See Jackson v. City of Beaumont Police Dep't*, 958 F.2d 616, 618 (5th Cir. 1992); *see also Doe v. MySpace, Inc.*, 528 F.3d 413, 417 (5th Cir. 2008). "The motion may be granted 'only if it appears that no relief could be granted under *any* set of facts that could be proven consistent with the allegations.'" *Jackson,*

958 F.2d at 618 (emphasis added) (quoting *Barrientos v. Reliance Standard Life Ins. Co.*, 911 F.2d 1115, 1116 (5th Cir. 1990) (quoting *Baton Rouge Bldg. & Construction Trades Council v. Jacobs Constructors, Inc.*, 804 F.2d 879, 881 (5th Cir. 1986))).

The central issue to determine under a 12(b)(6) or 12(c) analysis is "'whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief.'" *City of Beaumont Police Dep't*, 528 F.3d at 417 (quoting *Hughes v. The Tobacco Industry, Inc*., 278 F.3d 417, 420 (5th Cir. 2001)). A plaintiff is required to plead "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court must "'accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *Edionwe v. Bailey*, 860 F.3d 287, 291 (5th Cir. 2017) (quoting *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 816 (5th Cir. 2012)). In order to do this, the Court must engage in a two-step process wherein it first identifies "the complaint's well-pleaded factual content" and then determines if the "remaining allegations 'are sufficient to nudge the [plaintiff's] claim across the 'plausibility' threshold'". *Waller v. Hanlon*, 922 F.3d 590, 598 (5th Cir. 2019) (quoting *Doe v. Robertson*, 751 F.3d 383, 390 (5th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678))). Only if no possible construction of the alleged facts will entitle the Plaintiffs to relief should the Court grant the Defendant's motion. *See Hishon v. King & Spalding*, 467 U.S. 69, 73

(1984). "The plausibility standard is not akin to a 'probability requirement', but it asks for more than a sheer possibility that a defendant acted unlawfully." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). There is a not a heightened pleading standard, more than the usual pleading requirements of Rule 8(a), for 42 U.S.C. §1983 cases regarding municipal liability. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993). "The issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim. Thus, the court should not dismiss the claim unless the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in the complaint." *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999).

B. The City of Beaumont's 12(b)(6) motion to dismiss should have been dismissed as it was untimely and was not adequately preserved as a defense

Generally speaking, if a party brings up a defense to a pleading for a Rule 12 violation, then the party seeking such defenses "must be made before pleading if a responsive pleading is allowed." FED. R. CIV. P. 12(b). "If the defense is asserted in a motion to dismiss under Rule 12(b)(6), the motion must be lodged before an answer. . ." *See In re Morrison*, 421 B.R. 381, 385 (Bankr. S.D. Tex. 2009). Rule 12 motions may be heard after a responsive pleading is filed, but *only if* the same is preserved in the answer. *See, e.g. Snyders Heart Valve, LLC v. St. Judge Medical*

S.C., Inc., 2018 WL 3099709 at *3 (E.D. Tex. June 25, 2018); *see also Brokerwood Intern. (U.S.), Inc. v. Cuisine Crotone, Inc.*, 104 Fed.App'x 376, 379-380 (5th Cir. 2004). Rule 12(b)(6) motions are untimely if filed after responsive pleadings, however, "if a defense has previously been included in the answer, a court will generally allow a Rule 12(b)(6) motion." *Cloeren, Inc. v. Extrusion Dies Industries, LLC*, 2012 WL 12897045, at *2 (E.D. Tex. Aug. 14, 2012). The purpose of Rule 12(c) is to "dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Garza v. Escobar*, 972 F.3d 721, 727 (5th Cir. 2020) (quoting *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co*., 313 F.3d 305, 312 (5th Cir. 2002)).

Here, the district court erred in granting the City of Beaumont's 12(b)(6) motion and converting it to a 12(c) motion for judgment on the pleadings. The City of Beaumont answered Plaintiffs'-Appellants' Original Complaint on Nov. 6, 2018 and failed to preserve the 12(b)(6) defense in their answer.[47] Plaintiffs-Appellants filed their First Amended Complaint on April 26, 2019.[48] Yet, the City of Beaumont waited to file its Motion to Dismiss Plaintiffs' First Amended Complaint *after* the 21 days in which the responsive pleading was due[49], and did not file it until June 4,

[47] ROA.53-65.
[48] ROA.272-304.
[49] *See* FED. R. CIV. P. 12(a)(1)(A)(i), and FED. R. CIV. P. 12(b).

2019 (39 days after the Motion to Dismiss was due, and 18 days late), even though it was almost identical to the first Motion to Dismiss it had filed.[50] As such, the City of Beaumont's motion to dismiss was untimely and should have been dismissed.

Although finding that the City of Beaumont's motion was untimely, the district court declined to deny it on those grounds and converted the motion to a Rule 12(c) motion for judgment on the pleadings.[51] Because there are material facts in dispute, the motion could not be properly decided as a Rule 12(c) motion. The parties disagree on *who* the actual policymaker for the City of Beaumont is. The City of Beaumont contends that it is the City Council or City Manager; whereas Plaintiffs-Appellants identified Chief Singletary (Chief of Police for the City of Beaumont) as the official policymaker.[52] Next, the Appellants and Appellee disagree on whether or not the policy relating to off-duty officers not being able to carry tasers implies that they should carry guns and/or use deadly force.[53] As such, there are material facts that are disputed that made it improper for the Court to convert the City of

[50] ROA.355-375.
[51] ROA.458-460.
[52] *Compare* ROA.367-68 (Appellee states that the City Manager or City Council are the official policymakers) with ROA.299-300 (Appellants designate Chief Singletary as the official policymaker). The district court agreed with Appellants that it is reasonable to infer that Chief Singletary could be the official policymaker (ROA.467).
[53] *Compare* ROA.468 with ROA.292-93 (Appellants contend that by allowing their off-duty officers to only choose a deadly weapon as a weapon of choice, the City of Beaumont's policy and its application violated 42 U.S.C. §1983).

Beaumont's motion to a motion for judgment on the pleadings, and it should have been dismissed as untimely as a motion to dismiss.

C. Plaintiffs-Appellants stated viable 42 U.S.C. §1983 claims against the City of Beaumont

The district court made a determination that Plaintiffs-Appellants "adequately alleged a constitutional violation involving the use of excessive force by [Officer] Welch"[54], and found that [Officer] Welch was not entitled to qualified immunity at the Motion to Dismiss stage.[55] As such, the main question revolves around the City of Beaumont's potential municipal liability under §1983. The liability for a municipality attaches when there is proof of: "a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski v. City of Houston*, 237 F.3d 567, 577 (5th Cir. 2001) (quoting *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978)).

Under the first element of proof, Plaintiffs-Appellants, although not required to do so at this juncture, identified Chief Singletary as the policymaker for the City of Beaumont.[56] Though the City of Beaumont disagreed and believed that the policymaker should be either the City Manager or City Council, the district court found that it "reasonable to infer that Chief Singletary was authorized by the City

[54] ROA.461, 395.
[55] ROA.400-01.
[56] ROA.299-300.

Council and the City Manager to act as the City's policymaker with regard to law enforcement activities."[57] Plaintiffs-Appellants do not contest this part of the district court's order. As such, Plaintiffs-Appellants reasonably satisfied the first element of the analysis.

Under the second element, Plaintiffs-Appellants identified several policies and/or customs that were the moving forces of the constitutional violations at issue in this case. *First*, Plaintiffs-Appellants identified that the City of Beaumont adopted a policy and/or custom in which its off duty officers were not allowed to carry tasers was a moving force behind the constitutional violations. *Second*, Plaintiffs-Appellants identified that the City of Beaumont adopted a policy and/or custom in which its officers (whether off duty or not) were taught to shoot to kill, and not to shoot to injure was a moving force behind the constitutional violations. *Third*, Plaintiffs-Appellants identified that the City of Beaumont's widespread and persistent use of excessive force by its officers, which became so common place as to constitute a custom and/or policy, was a moving force behind the constitutional violations. *Fourth*, Plaintiffs-Appellants identified that the City of Beaumont's failure to train its officers in non-lethal weapons while off duty was a moving force behind the constitutional violations. *Fifth*, Plaintiffs-Appellants identified that the City of Beaumont's policy of a "code of silence" in which a cover up of instances of

[57] ROA.467.

excessive force was a moving force behind the constitutional violations. *Sixth*, Plaintiffs-Appellants identified that the City of Beaumont's failure to discipline / ratification of Officer Welch's excessive use of force was a moving force behind the constitutional violations.

1. **The policy of not allowing off duty officers to use non-lethal weapons, along with the policy of shoot to kill were the moving forces behind Plaintiffs'-Appellants' constitutional rights being violated**

The standard for a policy or custom is not that the policy is some sort of formal regulation, ordinance, or regulation, but may be a "'widespread practice that is 'so common and well-settled as to constitute a custom that fairly represents municipal policy'" *Covington v. City of Madisonville, TX*, 812 Fed.App'x. 219, 225 (5th Cir. 2020) (per curiam). Here, Plaintiffs-Appellants identified a policy or custom of the City of Beaumont wherein its off-duty officers were not allowed to carry Tasers or other non-lethal weapons, but rather, could only carry and use lethal weapons, such as firearms.[58] This was confirmed by Chief Singletary in speaking about the events surrounding this case[59], demonstrating actual or constructive knowledge of this policy or custom. This policy combined with the policy and/or custom that the City of Beaumont promulgated, wherein its officers shoot to kill instead of shoot to injure,

[58] ROA.292-93.
[59] "Police Chief Supports Officer after Shooting" KFDM.com Oct. 18, 2016 *available at* https://kfdm.com/news/local/police-chief-supports-officer-after-shooting (last accessed Oct. 31, 2020); *see* ROA.293.

are policies and/or customs that are "'implemented with 'deliberate indifference' to the 'known or obvious consequences' that constitutional violations would result.'" *Covington*, 812 Fed.App'x at 225 (quoting *Alvarez v. City of Brownsville,* 904 F.3d 382, 390 (5th Cir. 2018) (quoting *Board of County Com'rs of Bryan County, Okl. V. Brown*, 520 U.S. 397, 407 (1997))). To demonstrate "deliberate indifference" generally requires showing a pattern of similar violations that would likely lead to constitutional violations. *Covington*, 812 Fed.App'x at 225. However, there is a narrow "single incident" exception to the pattern requirement when "'it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy.'" *Id*. (quoting *Alvarez,* 904 F.3d at 390 (quoting *Burge v. St. Tammany Parish*, 336 F.3d 363, 370 (5th Cir. 2003))).

Here, Chief Singletary confirmed that the City of Beaumont's policy and/or custom is that its officers do not shoot to injure.[60] Coupled with the policy and/or custom to not allow their off duty officers to carry a taser, the City of Beaumont and/or its policymaker implemented these policies with deliberate indifference to the known or obvious consequence that excessive force and/or lethal force would result from these policies. This is directly related to the events that transpired on the night in question. Here, an off duty officer, Officer Welch, who was not allowed to have a taser or any other non-lethal weapon while off duty, and taught by the City of

[60] *Id*.

Beaumont to shoot to kill instead of to injure, ended up shooting an unarmed civilian, and killing him instantly, depriving him of his 4th and 14th Amendment rights. There is a direct causal link between the City of Beaumont's policies of not using non-lethal force when off duty and shoot to kill and Chaz York's infringement upon his 4th and 14th Amendments' rights. As such, the City of Beaumont's policies of not using non-lethal force when off duty and shoot to kill were moving forces behind the constitutional violations in this case.

2. The City of Beaumont widespread and persistent use of excessive force was a policy and/or custom, which was a moving force behind Plaintiffs'-Appellants' constitutional rights being violated

Next, Plaintiffs-Appellants stated that there was a widespread and persistent use of excessive force claims against the City of Beaumont over a ten-year period that demonstrated a policy and/or custom by the City of Beaumont of allowing its officers to use excessive force. Plaintiffs-Appellants obtained data demonstrating the Citizen and Administrative Complaints against the City of Beaumont from March 2008 – March 2018,[61] which showed 26% of all complaints made about the City of Beaumont by citizens related to "unauthorized use of force" or "unreasonable use of force" claims.[62] Approximately 8% of all administrative complaints against the City of Beaumont in the same time period relates to "use of force" or "unauthorized use

[61] ROA.290-92.
[62] ROA.290-291.

of force".[63]

In the case at hand, Officer Welch was found to have used unreasonable excessive force against Chaz York in shooting and killing him on October 14, 2016.[64] The policy or custom was tolerated and allowed by the City of Beaumont with deliberate indifference in that there is a pattern and practice of excessive force by its officers, as shown by the substantial number of similar complaints. It is obvious that should its officers use excessive force, constitutional violations would occur. There is a direct causal link between the City of Beaumont's policy or custom of excessive force and the infringement of Chaz York's 4th and 14th Amendments' rights. As such, the City of Beaumont's policy of excessive force was a moving force behind the constitutional violations in this case.

3. The City of Beaumont's failure to adequately train Officer Welch was a moving force behind Appellants' constitutional rights being violated

The Supreme Court has found that "inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons whom the police come into contact." *City of Canton Ohio v. Harris*, 489 U.S. 378, 388 (1989). The focus is on the "adequacy of the training program in relation to the tasks the particular officers must perform." *Id*. at 390. For liability to attach, the deficiency "must be closely related to the ultimate

[63] ROA.292.
[64] ROA.461.

injury." *Id*. at 391.

Here, prior to joining the Beaumont Police Department, Officer Welch had never worked at another police department.[65] He worked for four months with one security agency, and another month with another security agency.[66] He served in the U.S. Marine Corps as an Infantry Rifleman for 2 years.[67] And while he has experience on how to use a rifle and pistol, and was even considered an expert marksman, he did not receive *any* training that Plaintiffs'-Appellants could find relating to using *non-lethal* weapons while off duty by the Beaumont Police Department.[68]

The district court improperly focused its analysis on Plaintiffs'-Appellants' failure to train claim on whether or not Officer Welch had any training on use of force.[69] But Plaintiffs'-Appellants' failure to train claim is more particularized than that (as it must be) and is focused on whether or not the City of Beaumont provided training related to the use of non-lethal weapons while off duty. Here, there is nothing to show that the City of Beaumont provided such training and/or that Officer Welch received this training while in the U.S. Marine Corp or through his other employment.[70] This case is similar to *Brown v. Bryan County, OK*, in that Officer

[65] ROA.276-77.
[66] ROA.276.
[67] ROA.276.
[68] ROA.276-277, 287-88.
[69] ROA.475.
[70] ROA.276-277, 287-88.

Welch was a relatively inexperienced officer, who engaged in inappropriate conduct before joining the force[71], and the City provided no training for a task / situation that it could foresee its officers would be involved in. *Brown v. Bryan County, OK*, 219 F.3d 450, 454-55, 459-460 (5th Cir. 2000).

It is a fair assumption to make that the City of Beaumont did not only fail to train Officer Welch, but also the rest of its officers on non-lethal use of force when off duty, given the substance of its other policies (to not allow its officers to carry tasers while off duty and to shoot to kill). Regardless, this decision to not train Officer Welch in this respect amounts to a "policy". *See Brown*, 219 F.3d at 462. The decision to not train Officer Welch and its officers in general in non-lethal use of force while off duty constitutes "deliberate indifference" to the health and safety of the citizens of Jefferson County. Given, Officer Welch's propensity for violence and use of excessive force in the past, the decision to not train him on the use of non-lethal force showed deliberate indifference to the health and safety of the public. As noted *supra*, Officer Welch's record prior to the shooting of Chaz York included ramming his official vehicle against a fleeing suspect multiple times[72]; holding a citizen who was out walking his dog at gunpoint[73]; shooting and killing a citizen

[71] *See* ROA.277 (Officer Welch was arrested or detained twice before his joined the force for fighting and/or being a suspicious person).
[72] ROA.285
[73] ROA.286

who was about to commit suicide[74]; and damaging his city-issued laptop because he was "upset" or "angry" about his disciplinary record.[75] Thus, taken the well-pled facts in a light most favorable to Plaintiffs-Appellants, it is plausible that the City of Beaumont's decision not to train Officer Welch would result in a constitutional deprivation of rights.

Here, in applying the City of Beaumont's decision not to train Officer Welch in non-lethal use of force while off duty was a direct causal link to Officer Welch shooting and killing Chaz York on October 14, 2016 with an unreasonable use of excessive force. Taking the well-pled facts in a light most favorable to Plaintiffs-Appellants, Chaz York was unarmed[76], made no violent movements towards Officer Welch[77]; was retreating and leaving the bar / restaurant thereby de-escalating the conflict[78]; was given no instructions by Officer Welch to "stop" or put his arms up, and did not resist arrest nor was suspected for fleeing the scene after committing a crime[79]. Meanwhile, Officer Welch clearly escalated the conflict with a civilian[80]; did not identify himself as a police officer to Chaz York or his friend specifically[81]; while Chaz York and his friend were peacefully leaving the scene, Officer Welch

[74] *Id.*
[75] ROA.285.
[76] ROA.296
[77] *Id*.
[78] ROA.296-97
[79] ROA.297
[80] ROA.279
[81] ROA.280

continued to escalate the conflict[82]; fatally shot Chaz York while he was turned away, running away to save his life, and was unarmed.[83] Had Officer Welch been trained in utilizing non-lethal weapons and/or non-lethal use of force instead of only using lethal force while off duty, Chaz York would probably be still alive today. There is a direct causal link between the City of Beaumont's failure to train Officer Welch in non-lethal use of force while off duty and the infringement of Chaz York's 4th and 14th Amendments' rights. As such, the City of Beaumont's failure to train Officer Welch and its officers generally in non-lethal use of force while off duty was a moving force behind the constitutional violations in this case.

4. The City of Beaumont's "code of silence" was a moving force behind Plaintiffs-Appellants' constitutional rights being violated

This Court has found that a "code of silence" can act as a city's custom, practice or policy for §1983 violations. *See Sharp v. City of Houston*, 164 F.3d 923, 935 (5th Cir. 1999). Here, Plaintiffs-Appellants noted that the majority of the citizen complaints that were filed against the City of Beaumont in the ten year period of March 2008 – March 2018 had either 1) no data entered (8.04%), 2) a finding of exoneration (39.29%), 3) not sustained (8.93%), or 4) unfounded (17.86%).[84] The total percentage amounts to 74% of the time where the City of Beaumont took no

[82] *Id*.
[83] ROA.280-81.
[84] ROA.291.

disciplinary action on a citizen complaint. Only a small majority, specifically 18.75%, of the complaints launched were actually sustained.[85] However, for a "code of silence" to work the "custom or practice of deliberate indifference to rights need not be followed at every juncture in order to constitute 'tacit authorization or encouragement of wrongful conduct.' A reasonable jury could conclude that the [police department] acted in the exceptional and highly visible cases, yet deliberately chose not to respond to numerous instances . . ." *Sharp*, 164 F.3d at 935 (citation omitted).

Furthermore, part of the "code of silence" was to coverup / fabricate evidence. This was seen in the City of Beaumont's post-shooting reporting of Chaz York, wherein it immediately went on the defensive, stating that Mr. York had a bat, and was a danger to the public.[86] This version of events was widely publicized in the media by Chief Singletary and the City of Beaumont despite the fact that it would not release 911 tapes, or videotapes of the restaurant / bar (which showed actual footage of what transpired) for reasons that the investigation was "ongoing".[87] Furthermore, during the investigation, several officers intimidated witnesses and accused them of lying or tampering with evidence when they came forward and told

[85] *Id*.
[86] ROA.283-84.
[87] ROA.284.

the officers that they did not see Chaz York with a bat.[88] These witnesses were not presented in front of the grand jury.[89] The City of Beaumont knew its officers' versions of what happened to Chaz York was misleading and/or false, and continued to allow them to represent a fabricated / inflated story in the media.[90]

These actions by the City of Beaumont are in line with its custom and/or policy of the "code of silence" wherein its officers habitually cover up instances of excessive force. This is widespread and persistent practice in the City of Beaumont as seen with the prior citizen complaints and/or administrative complains launched against the City of Beaumont.[91] Because of the "code of silence" custom and/or policy, there is a direct causal link between what occurred with Chaz York and this policy. Officer Welch would have been aware of this policy and/or custom of the "code of silence" in his unreasonable use of excessive force and knew that he could use this excessive force without any consequences to him within the police department. As such, there is a direct causal link between the City of Beaumont's policy or custom of the "code of silence" and the infringement of Chaz York's 4th and 14th Amendments' rights. As such, the City of Beaumont's code of silence policy or custom was a moving force behind the constitutional violations in this case.

5. The City of Beaumont's ratification of Officer Welch's past use of

[88] ROA.285, 290.
[89] ROA.290.
[90] *Id*.
[91] ROA.291-92 (there are specific instances shown where the complaints are for officer's procedures in reporting use of force, unprofessional conduct, misconduct, and untruthfulness).

excessive force / failure to discipline Officer Welch was a moving force behind Plaintiffs-Appellants' constitutional rights being violated

The Supreme Court has found that "when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve the subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because the decision is final." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). Therefore, in *Praprotnik*, the Supreme Court first adopted the idea of "ratification" as a basis for municipal liability in §1983 claims. Thereafter, this Court has also found "ratification" as a basis for municipal liability in §1983 cases in certain factual circumtances. *See Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985). Moreover, this Court has clarified that "municipal policymakers who fail to supervise and to discipline their police officers, acting with deliberate indifference to the citizens' rights could create municipal liability if the lack of supervision then caused a deprivation." *Milam v. City of San Antonio*, 113 Fed.App'x 622, 628 (5th Cir. 2004). The failure to discipline, coupled with other relevant evidence, can support an inference of a preexisting policy. *Id*.

Here, there is evidence that the City of Beaumont and/or Chief Singletary have failed to discipline and/or supervise Officer Welch's past instances of use of excessive force, thereby ratifying his conduct of excessive force in the past. For

example, Officer Welch held a man who was walking his dog at gunpoint several years before the Chaz York shooting and threatened to shoot the dog despite the fact that he had no probable cause to believe this man was committing a crime or would commit a crime.[92] The City of Beaumont and/or Chief Singletary took no disciplinary action against him for this.[93] Thereafter, just a few months before the shooting of Chaz York, Officer Welch shot and killed Herbert Ballance, who was holding a gun to his own head, presumptively to commit suicide.[94] Officer Welch shot and killed him with a long range rifle through the mouth, which tends to support the presumption that he was nowhere near Mr. Ballance and therefore Mr. Ballance was most likely not a threat to Officer Welch.[95] Once again, City of Beaumont and/or Chief Singletary took no disciplinary action against him. Officer Welch had a variety of other excessive forces / violent items for which he was disciplined, but it is telling that when he uses a gun or threatens to use a gun, the City clears him of all wrongdoing, and when it is a simple property damage case is the only time he is disciplined.[96] This demonstrates a pattern and practice of the City of Beaumont and/or Chief Singletary of only disciplining Officer Welch and/or its officers for the least offensive instances of excessive force, and not when the health and safety of

[92] ROA.286.
[93] *Id.*
[94] *Id*.
[95] *Id*.
[96] ROA.285-86.

the public are at stake. This further confirms that by failing to discipline Officer Welch for his most egregious uses of excessive force, the City of Beaumont and/or Chief Singletary have shown a deliberate indifference the health and safety of the citizens of Jefferson County, TX. It is no wonder than when Officer Welch shoots and kills Chaz York there is once again no disciplinary action taken against Officer Welch.[97] As such, there is a direct causal link between the City of Beaumont's policy or custom of ratifying Officer Welch's egregious use of excessive force and/or failing to discipline or supervise him and the infringement of Chaz York's 4th and 14th Amendments' rights. As such, the City of Beaumont's policy or custom of ratifying Officer Welch's use of excessive force and/or failing to discipline / supervise him was a moving force behind the constitutional violations in this case.

D. Plaintiffs-Appellants are entitled to attorney's fees if successful on their 42 U.S.C. §1983 claims against the City of Beaumont

Because the district court erred in granting the City of Beaumont's motion to dismiss and/or motion for judgment on the pleadings for Plaintiffs'-Appellants' §1983 claims, the district court also erred in granting the City of Beaumont's dismissal of Plaintiffs'-Appellants' request for attorney's fees. As shown *supra*, Plaintiffs-Appellants have pled plausible theories of recovery for their §1983 claims against the City of Beaumont. Accordingly, pursuant to 42 U.S.C. §1988(b),

[97] ROA.286 (Officer Welch was consistently given raises while at the Beaumont Police Department, despite these egregious violations, and was not let go after killing Chaz York).

Plaintiffs-Appellants are entitled to reasonable attorney's fees if ultimately successful on their §1983 claims. As such the district court erred in denying Plaintiffs'-Appellants' request for reasonable attorney's fees.

VI. CONCLUSION

It is clear that Plaintiffs-Appellants have met the Rule 8 standard and have well-pled specific and plausible §1983 claims against the City of Beaumont as contained in the 33 pages of their First Amended Complaint. For the foregoing reasons, this Court should reverse the district court's order, which granted the City of Beaumont's motion to dismiss as to Plaintiffs'-Appellants' §1983 claims and request for attorney's fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument has been served via the Court's ECF filing system in compliance with Fed. R. App. P. 25(b) and (c) on November 2, 2020, on all registered counsel of record, and has been transmitted to the Clerk of the Court.

/s/ Nishi Kothari
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1) and 5th Cir. R. 32.3, I, the undersigned counsel, hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the type-face requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6). Specifically, I, the undersigned counsel, hereby state the following:

1) this brief contains 7,276 words, and 677 lines in its principle brief;
2) this brief is proportionally spaced in Microsoft Word; and
3) this brief uses Times New Roman, 14-point font (except for footnotes, which uses Times New Roman, 12-point font)

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