IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JEAN GOLDMAN, *Plaintiff,*	§	
vs.	§	NO. 4:14-CV-00433
CHARLES WILLIAMS, BRIAN SKERO, and MONTGOMERY COUNTY, TEXAS, *Defendants.*	§	JURY TRIAL DEMANDED

DEFENDANT SKERO'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM OR, ALTERNATIVELY, FOR MORE DEFINITE STATEMENT

Defendant Brian Skero ("Skero") moves under FED. R. CIV. P. 12(b)(6) for dismissal of this action against him for failure to state a claim. Alternatively, Defendant Skero requests a more definite statement of the Plaintiff's claims against him. *See* FED. R. CIV. P. 12(e).

I. NATURE OF THE CASE.

This is a police arrest case arising under 42 U.S.C. § 1983 and state tort law. The Plaintiff, Jean Goldman ("Goldman"), alleges that on February 26, 2012, Officer Skero stopped her vehicle on I–45. She alleges that a citizen had reported to police that she had been driving erratically, although she denies the truth of the citizen report. The complaint alleges that Skero, at all relevant times, was acting in his capacity as a police officer of the City of Willis Police Department. 1st Amd. Compl., at ¶ 8. After Officer Skero executed the stop, an officer from a different agency arrived on the scene, DPS Trooper Charles Williams ("Williams"), who handcuffed her and took her into custody. She was allegedly detained in the Montgomery County jail for five days, where she allegedly suffered other indignities. There is no allegation that Officer Skero had any involvement in the treatment she allegedly received in the county jail.

In her first amended complaint, Goldman has asserted the following causes of action against Skero in his individual capacity:

1. false arrest in violation of the Fourth Amendment (42 U.S.C. § 1983) (1st Amd. Compl., at ¶ 42);

2. false imprisonment for wrongful detainment in the county jail (42 U.S.C. § 1983) (1st Amd. Compl., at ¶ 43);

3. Texas common law malicious prosecution (1st Amd. Compl., at ¶ 44); and

4. Texas common law intentional infliction of emotional distress (1st Amd. Compl., at ¶ 45).

II. STANDARD OF REVIEW & GROUNDS FOR DISMISSAL.

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id*. at 555 (quotation marks, citations, and footnote omitted).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id*. (quoting *Twombly*, 550 U.S. at 557 (brackets omitted)).

As discussed below, Officer Skero requests the Court to dismiss Goldman's claims against him for the following reasons:

(1) The pleadings allege facts which establish that Skero had arguable reasonable suspicion to stop Goldman's vehicle – an identified citizen called and reported to a 911 operator that Goldman was speeding and swerving.

(2) The pleadings fail to set out a plausible set of facts which, if true, would establish that Officer Skero had any personal involvement in the decision by Trooper Williams to arrest or charge Goldman.

(3) Even if the pleadings allege sufficient personal involvement on Officer Skero's part to implicate him in Trooper Williams' decision to arrest Goldman, the facts alleged establish that arguable probable cause supported the arrest – the citizen report coupled with Goldman's refusal to take a breathalyzer test and her failure to complete other valid field sobriety tests.

(4) Public officials are immune from Texas common law tort liability under TEX. CIV. PRAC. & REM. CODE § 101.106.

III. FACTS ALLEGED.

The material factual allegations pertaining to Officer Skero are as follows:

8. On or about February 26, 2012 and at all times pertinent to the cause of action stated in this Complaint, the Defendant Brian Skero was a duly appointed Officer with the Willis Police Department in Texas, and was fully qualified as such and acting at all times in his official capacity pursuant to the authority vested in him by that office.

. . .

10. On February 26, 2012, Plaintiff Jean Goldman was driving northbound on Interstate-45 ("I-45").

11. Officer Skero allegedly received a phone call from the Montgomery County Sheriff's Office dispatch center, during which he was allegedly told the dispatch center had received a call from a civilian named Jonathan Gammons claiming he had seen a car swerving and speeding. (The police video shows otherwise.).

12. Officer Skero pursued Goldman's vehicle and stopped Goldman near or at the intersection of I-45 and FM1375 at or around 3:02 p.m., well outside of the city limits of the City of Willis. . . . Defendant Williams was thereafter summoned to the scene.

13. . . . . Goldman did not drink at any point in time relevant to this suit.

. . .

15. Goldman attempted to complete an "HGN" test conducted by Officer Skero involving following his finger with her eye but was physically unable to do so due to her neck brace and recent neck surgery, facts she conveyed to Trooper Williams. Trooper Williams nevertheless handcuffed Goldman, . . .accused her of being drunk, and said she was under arrest.[1]

16. Goldman complained the handcuffs were too tight and developed bruises and open wounds from them, but Defendant Williams did not loosen the cuffs.

. . .

20. Goldman refused to take a Breathalyzer . . . . Officer Skero and Trooper Williams never offered Goldman the opportunity to take a blood test.

21. Trooper Williams arrested Goldman on the charge of driving while intoxicated, grabbed Plaintiff by the neck and shoulder and pushed her to his car, and transferred her to Montgomery County Jail, where she was booked at or near 6:26 p.m.

Pl. 1st Amd. Complaint.

IV. ARGUMENT AND AUTHORITIES.

A. Section 1983/Qualified Immunity.

Qualified immunity is "an immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Thus, the Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Scott v. Harris*, 550 U.S. 372, 376 n.2 (2007) (internal quotations

[1] Nystagmus is an involuntary rapid oscillation of the eyes in a horizontal, vertical, or rotary direction. *Emerson v. State*, 880 S.W.2d 759, 765 (Tex. Crim. App. 1994). Horizontal-gaze nystagmus – or HGN – refers to the inability of the eyes to smoothly follow an object moving horizontally across the field of vision, particularly when the object is held at an angle of forty-five degrees or more to the side. *See Webster v. State*, 26 S.W.3d 717, 719 n.1 (Tex. App.—Waco 2000, pet ref'd). Consumption of alcohol exaggerates nystagmus to the degree that it can be observed with the naked eye. *Emerson*, 880 S.W.2d at 766.

deleted); *see also Osborn v. Haley*, 549 U.S. 225, 253 n.18 (2007) ("under our jurisprudence, immunity-related questions should be resolved at the earliest opportunity"); *Pearson*, 555 U.S. at 232.

A motion for qualified immunity may be considered a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "The doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal." *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 2740 (U.S. 2012). "This immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id*. (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). A court must grant immunity "unless 'existing precedent must have placed the statutory or constitutional question *beyond debate*.'" *Id*. (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (U.S. 2011) (Fifth Circuit's emphasis). "A plaintiff seeking to defeat qualified immunity must show: '(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct.'" *Id*. (quoting *al-Kidd*, 131 S. Ct at 2080). A court has discretion to decide which prong to consider first. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

1. *Traffic Stop*.

The legality of a traffic stop is analyzed under the framework articulated in *Terry v. Ohio*, 392 U.S. 1 (1968). *See United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005). Under the two-part *Terry* reasonable suspicion inquiry, the Court must ask "whether the officer's action was: (1) 'justified at its inception'; and (2) 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id*. (quoting *Terry*, 392 U.S. at 19-20).

The law relating to *Terry* stops was recently revisited by the U. S. Supreme Court in *Prado Navarette v. California*, 2014 U.S. LEXIS 2930 (U.S. Apr. 22, 2014). Relating to the standard of probable suspicion, the Court stated:

> The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981); *see also Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The "reasonable suspicion" necessary to justify such a stop "is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990). The standard takes into account "the totality of the circumstances—the whole picture." *Cortez, supra*, at 417, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). Although a mere "'hunch'" does not create reasonable suspicion, *Terry, supra*, at 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause, *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989).

Prado Navarette v. California, 2014 U.S. LEXIS 2930, at *6-7.

For a traffic stop to be justified at its inception, an officer must have an objectively reasonable suspicion that some sort of illegal activity, such as a traffic violation, occurred, or is about to occur, before stopping the vehicle. *See United States v. Breeland*, 53 F.3d 100, 102 (5th Cir. 1995). Reasonable suspicion exists when the officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the stop. *See, e.g.*, *United States v. Santiago*, 310 F.3d 336, 340 (5th Cir. 2002).

In Paragraph 11 of Goldman's complaint, she has alleged that "Officer Skero allegedly received a phone call from the Montgomery County Sheriff's Office dispatch center, during which he was allegedly told the dispatch center had received a call from a civilian named Jonathan Gammons

claiming he had seen a car swerving and speeding." 1st Amd. Compl., at ¶ 11. There is no allegation that (1) Jonathan Gammons did not make such a report, or (2) the dispatch center did not receive such a report from Mr. Gammons, or (3) the dispatch center did not relay the contents of the Gammons report to Officer Skero by a phone call.

As the Supreme Court recently held in *Prado Navarette*, even an anonymous 911 caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving. *Prado Navarette v. California*, 2014 U.S. LEXIS 2930, at *14. Mr. Gammons' report is clearly sufficient to support Officer Skero's decision to stop her and investigate whether she was sober. *See United States v. Fooladi*, 703 F.2d 180, 183 (5th Cir. 1983)(police should be able to depend on reliability of average citizen absent special circumstances); *State v. Stolte*, 991 S.W.2d 336, 341-32 (Tex. App.—Fort Worth 1999, no pet.)(holding reasonable suspicion existed for officer to stop defendant for DWI when the sole basis was the call of a driver following the defendant, who was driving slowly and weaving on the freeway, when the caller followed the defendant's truck; described it; gave its license plate, location, and direction; and then parked behind the officer after the defendant had been stopped); *Malkowsky v. Texas Dep't of Pub. Safety*, 53 S.W.3d 873, 875-76 (Tex. App.—Houston [1st Dist.] 2001, pet. denied)(reasonable suspicion for DWI stop existed where named informant reported to dispatcher that suspect driver was driving "recklessly," and was unsure whether the suspect driver was "intoxicated or just falling asleep").

Whether Officer Skero's video camera depicts Goldman swerving or speeding is immaterial. The fact that a self-identified citizen had reported to a county 911 operator that Goldman's vehicle had been swerving and speeding justifies the stop. The officer did not need to witness Goldman's reckless

driving himself. Accordingly, the Court should dismiss Goldman's 4th Amendment wrongful stop claim against Skero.

2. Wrongful Arrest & Detention.

It is important to note that Goldman does not allege that Officer Skero arrested her (as distinguished from briefly detaining her). Rather, it was DPS Trooper Williams who is alleged to have accused her of being drunk, handcuffed her, and told her she was under arrest after she proved "unable to complete" a field sobriety test and refused to take a breathalyzer test. *See* 1st Amended Compl., at ¶¶ 15, 20; see also ¶ 21 ("Trooper Williams arrested Goldman on the charge of driving while intoxicated, grabbed Plaintiff by the neck and shoulder and pushed her to his car, and transferred her to Montgomery County Jail, where she was booked at or near 6:26 p.m."). Officer Skero does not acknowledge the truth of any of Goldman's allegations of wrongdoing against Defendant Williams, but points them out in order to argue that the allegations do not state a claim against himself.

In order to hold an officer liable under § 1983, the officer must become personally involved in the claimed tort. *Murphy v. Keller*, 950 F.2d 290, 292 n.7 (5th Cir. 1992). "An officer's mere presence at the scene fails to provide the requisite personal involvement to support a false arrest." *Powell v. City of Chicago*, 2013 U.S. Dist. LEXIS 43967, at *20, 2013 WL 1290131 (N.D. Ill. Mar. 27, 2013) (citing *Morfin v. City of Chicago*, 349 F.3d 989, 1000-01 (7th Cir. 2003)).

Because there are no factual allegations that show that Officer Skero participated in Trooper William's decision to arrest Goldman or any involvement in the decision to hold her in the Montgomery County jail, these § 1983 arrest and detention claims against Skero should be dismissed.

Alternatively, if the allegations are sufficient to implicate Skero in the decision to arrest and/or detain Goldman, immunity should still attach because arguable probable cause existed to arrest her.

"[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). "Probable cause exists when the facts available at the time of the arrest would support a reasonable person's belief that an offense has been, or is being, committed and that the individual arrested is the guilty party." *Blackwell v. Barton*, 34 F.3d 298, 303 (5th Cir. 1994). If an officer has probable cause to believe that an individual has committed even a very minor criminal offense, he may, without violating the Fourth Amendment, arrest the offender. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

In *Devenpeck*, the Supreme Court clarified that an arrest is lawful under the Fourth Amendment so long as probable cause existed for *any* offense that could be charged, regardless of whether it was actually charged. 543 U.S. at 152.

Probable cause is determined on the basis of facts available to the officer at the time of the arrest and may be supported by the collective knowledge of law enforcement personnel who communicate with each other prior to the arrest. *Evett*, 330 F.3d at 688. In addition, "an eye witness's statement that he or she saw a crime committed or was the victim of a crime is generally sufficient to establish probable cause." *United States v. Shaw*, 464 F.3d 615, 623 (6th Cir. 2006).

The objective reasonableness standard for qualified immunity differs from that for probable cause. *Evett*, 330 F.3d at 688 (citing *Wren v. Towe*, 130 F.3d 1154, 1160 (5th Cir. 1997)). This inquiry may properly assume the officer *lacked* probable cause to make the arrest and ask whether the officer's arrest of the plaintiff, even if illegal, was nevertheless objectively reasonable. *See id*.

As the Fifth Circuit has noted, "[a]n officer's entitlement to qualified immunity based on probable cause is difficult for a plaintiff to disturb." *Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d 743,

753 (5th Cir. 2001). *See also Brown v. Lyford*, 243 F.3d 185, 190, n.7 (5th Cir. 2001) (holding that "[a] plaintiff must clear a significant hurdle to defeat qualified immunity" and that there "must not even arguably be probable cause for the search and arrest for immunity to be lost") (internal quotation omitted). That is, "if officers of reasonable competence could disagree on whether or not there was probable cause to arrest a defendant, immunity should be recognized." *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995) (citation omitted). "As applied to the qualified immunity inquiry, the plaintiff must show that the officers could not have reasonably believed that they had probable cause to arrest the plaintiff for *any crime*." *Good v. Curtis*, 601 F.3d 393, 401 (5th Cir. 2010) (emphasis added) (citing *Devenpeck*).

Both parts of the immunity analysis raise legal issues for this Court to decide. If the underlying *material* facts are undisputed, the issue of probable cause is a question of law. *See Blackwell v. Barton*, 34 F.3d 298, 305 (5th Cir. 1994). The issue of whether the officer was objectively reasonable in determining that probable cause existed – that is, whether probable cause is "arguable" for immunity purposes – is also a question of law. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (whether under the circumstances a reasonable officer could believe probable cause for arrest existed, thus giving rise to qualified immunity, is a question of law).

In this case, Goldman's pleadings establish arguable probable cause for her arrest. First, a citizen (Gammons) reported to police that he saw her swerving and speeding, both of which are stand alone crimes. TEX TRANSP. CODE § 545.351(a) ("An operator may not drive at a speed greater than is reasonable and prudent under the circumstances then existing."), § 545.401(a) ("A person commits an offense if the person drives a vehicle in wilful or wanton disregard for the safety of persons or property."). Second, she claimed to be unable to complete an "HGN" test. *See Emerson v. State*, 880

S.W.2d 759, 765 (Tex. Crim. App. 1994) (examining the underlying scientific theory of HGN testing and determined the science is valid). Third, she refused to preform a breathalyzer test – an indicia of guilt.

Other circuits recognize that a plaintiff's refusal to take a breathalyzer test is a factor to be considered in giving officers probable cause to arrest. *See, e.g., Miller v. Harget*, 458 F.3d 1251, 1260 (11th Cir. 2006); *Summers v. Utah*, 927 F.2d 1165, 1166 (10th Cir. 1991).

In *Miller v. Harget*, 458 F.3d 1251 (11th Cir. 2006), the Eleventh Circuit held that an officer had probable cause to arrest an individual on suspicion of DUI where (1) the officer witnessed the individual driving a vehicle, (2) the officer smelled alcohol emanating from the vehicle's interior, and (3) the individual refused to take a breathalyzer test. The court explained:

> Whether or not [the officer] had probable cause to arrest Mr. Miller because the officer smelled alcohol coming from the vehicle, the officer did have reasonable suspicion. He reasonably detained Mr. Miller in order to investigate whether he had been driving under the influence. *From this detention, probable cause developed, justifying Mr. Miller's arrest, because Mr. Miller refused to take a breathalyzer test.*

Id. at 1259-60 (emphasis added) (internal citations omitted).

A similar result obtained in *Wilder v. Turner*, 490 F.3d 810 (10th Cir. Colo. 2007), where the Tenth Circuit stated that "[a] field sobriety test is a minor intrusion on a driver only requiring a reasonable suspicion of intoxication and an easy opportunity to end a detention before it matures into an arrest." *Id*. at 815 (internal quotations omitted). "A reasonable officer in Officer Turner's position could view Plaintiff's refusal to submit to a field sobriety test as indicative of an intent to conceal evidence of guilt." *Id*. As *Miller* correctly notes:

> Any other conclusion would tie the hands of law enforcement in their efforts to keep intoxicated drivers off the streets. If a driver refused to submit to a test after an officer smelled alcohol, the officer would have no

> choice but to let him or her go, absent other evidence the driver had been drinking.

Miller, 458 F.3d at 1260. A contrary conclusion would simply allow a driver to "escape arrest simply by refusing to cooperate." *Id*.

Accordingly, the Court should dismiss Goldman's section 1983 claims against Officer Skero.

B. 101.106(f).

Skero seeks dismissal of all of Goldman's Texas common law tort claims under TEX. CIV. PRAC. & REM. CODE § 101.106(f), which provides:

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

TEX. CIV. PRAC. & REM. CODE § 101.106(f).

Section 101.106(f) provides government employees "immunity from suit in certain instances." *Tipps v. McCraw*, 945 F. Supp. 2d 761, 766 (W.D. Tex. 2013) (citing *Univ. of Tex. Health Sci. Ctr. v. Bailey*, 332 S.W.3d 395, 401 (Tex. 2011)). "The statute strongly favors dismissal of governmental employees." *Id.* (citing *Waxahachie Indep. Sch. Dist. v. Johnson*, 181 S.W.3d 781, 785 (Tex. App.—Waco 2005, pet. denied)).

As the Texas Supreme Court explained in *Franka v. Velasquez*, 332 S.W.3d 367 (Tex. 2011), Section 101.106(f) was intended to "foreclose suit against a government employee in his individual capacity if he was acting within the scope of employment." *Id.*, at 381. The Franka Court reasoned that in waiving governmental immunity for the governmental unit, "the [Texas] Legislature correspondingly

sought to discourage or prevent recovery against an employee." *Id*. at 384. Under the *Franka* rule, all tort claims, including intentional torts, "could have been brought" against the governmental unit, regardless of whether the governmental unit's immunity from suit is expressly waived by the Texas Tort Claims Act for those claims. *Id*. at 385. Section 101.106(f) thus "achieves the same end under Texas law as the Westfall Act does under federal law" – to make whatever remedy the Federal Tort Claims Act provides against the United States a claimant's exclusive remedy for a government employee's conduct in the scope of employment. *Id*. at 385.[2] *See also Tex. Adjutant General's Office v. Ngakoue*, 408 S.W.3d 350, 357 (Tex. 2013) ("in enacting subsection (f), the Legislature foreclosed suit under the TTCA against a government employee in his individual capacity if he was acting within the scope of employment. This furthers one of the primary purposes of both the TTCA generally and section 101.106 in particular—to protect governmental employees acting in the scope of employment.") (internal quotations and brackets omitted).

Accordingly, a defendant is entitled to dismissal of all Texas law claims under section 101.106(f) "upon proof that the plaintiff's suit (1) was based on conduct within the scope of the defendant's employment with a governmental unit and (2) could have been brought against the governmental unit under the Tort Claims Act." *Tipps*, 945 F. Supp. 2d at 766; *see also Franka*, 332 S.W.3d at 369.

The Texas Tort Claims Act defines "scope of employment" as "the performance for a governmental unit of the duties of an employee's office or employment and includes being in and about the performance of a task lawfully assigned to an employee by competent authority." Tex. Civ. Prac.

[2] Under the Westfall Act, federal employees have absolute immunity from suit for common-law tort claims related to acts undertaken within the scope of their federal employment. 28 U.S.C. § 2679(b)(1). Under the Westfall Act, "[t]he remedy against the United States provided by [§] 1346(b) [the FTCA] . . . is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim." 28 U.S.C. § 2679(b)(1).

& Rem. Code § 101.001(5); *see also City of Lancaster v. Chambers*, 883 S.W.2d 650, 658 (Tex. 1994) (finding that on-duty police officers, pursuing a suspect in squad car, did not act outside the scope of their authority in driving without regard for safety of others).

Clearly, the complaint in this case alleges conduct within the general scope of employment. Goldman alleges that "at all times pertinent to the cause of action stated in this Complaint, the Defendant Brian Skero was a duly appointed Officer with the Willis Police Department and that Skero was "acting at all times in his official capacity pursuant to the authority vested in him by that office." 1st Amd. Compl. ¶ 8.

Likewise, the intentional torts Goldman has asserted against Skero are claims that could have been brought against Skero's governmental employer under the Tort Claims Act. *See, e.g., Tipps*, 945 F. Supp.2d at 768 (dismissing false imprisonment, malicious prosecution, and intentional infliction of emotional distress claims against two police officers under § 101.106(f)); *Villasana v. City of San Antonio*, Civ. A. No. SA-13-CV-278-XR, 2014 U.S. Dist. LEXIS 19698, 2014 WL 640965, at *13 (W.D. Tex. Feb. 18, 2014) (dismissing false arrest claims against police officer and sergeant under § 101.106(f) because no party disputed that officer and sergeant arrested plaintiff while on duty).

Under Section 101.106(f), therefore, the Court should dismiss all state law claims against Skero unless Goldman dismisses those claims voluntarily within 30 days after this motion is filed (i.e., by no later than June 4, 2014).

C. More Definite Statement.

In immunity cases, the plaintiff must satisfy a heightened pleading standard that requires allegations of facts which, if proved, would overcome the official's immunity from suit. *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995) (en banc). The District Court must insist that a plaintiff

suing a public official under § 1983 file a complaint "that rests on more than conclusions alone." *Id*.

When addressing a qualified immunity defense, the United States Supreme Court has held that "[t]he court may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e)." *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). Rule 12(e) allows a party to "move for a more definite statement of a pleading to which a responsive pleading is allowed" if it is "so vague or ambiguous that the party cannot reasonably prepare a response." *Id*.

Accordingly, if the Court declines to dismiss any of the Plaintiff's claims at this juncture, Skero requests that the Court order the Plaintiff to file a more definite statement of her claims against him. Goldman should be ordered to plead specific facts, if such exist,

(1) to negate any colorable argument that Skero had reasonable suspicion to stop her vehicle;

(2) to establish that Skero was personally involved in the decision to arrest her;

(3) to establish that no reasonable officer in Skero's position could have believed that probable cause for her arrest existed at the time Skero was on the scene; and

(4) to establish that Skero was personally involved in the decision to detain Plaintiff in the Montgomery County jail.

V. CONCLUSION.

Accordingly, Defendant Brian Skero requests that the Court dismiss this action against him for failure to state a claim. Alternatively, Skero requests that the Court order Goldman to file a more definite statement of her claims within ten days.

Respectfully submitted,

By: /s/ *Ramón G. Viada*
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CERTIFICATE OF SERVICE

I certify that all counsel of record have been served a true and correct copy of this document by electronic submission for filing and service through the Electronic Case Files System of the Southern District of Texas or by email transmission on May 5, 2014.

/s/ *Ramón G. Viada III*
Ramón G. Viada III