IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Phyllis May, Administrator,	**:**	**Case No. C2-00-1081**
Plaintiff,	**:**	**Judge Holschuh**
v.	**:**	**Magistrate Judge Kemp**
Franklin County Board of Commissioners, et al.,	**:**	
Defendants.	**:**	

COUNTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Franklin County Board of Commissioners; Franklin County; Jim Karnes, Franklin County Sheriff; Marino A. Susi; and Earl P. Taylor, (hereinafter, collectively, the County Defendants), by and through the undersigned counsel and pursuant to Civ. R. 56 of the Federal Rules of Civil Procedure, move this Court for summary judgment on all claims in this action. Summary judgment is warranted because there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law. A Memorandum in Support is attached and hereby incorporated by reference.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. STATEMENT OF THE FACTS

Phyllis May is the administrator of the estate of Deborah Kirk. Deborah Kirk (Kirk) was killed by Marvin Moss (Moss) on or about August 13, 1998.

As of April 1998, Kirk lived in Huntsville, Alabama with Moss and "Phillip", an elderly man who was a friend of Moss'. (Depo. Sturgill 10-11.) Moss and Kirk had a relationship that dated back to at least 1997. (Depo. May 79-80.) In April of 1998, Kirk and Moss came to Columbus, because Kirk's mother was ill with cancer. Kirk and Moss lived with Plaintiff for about a month (Depo. Sturgill 15), and then moved in for about a month and a half with Brenda Sturgill and her husband. (Id. at 16-17.) Sturgill spent a lot of time with them, and saw them argue, but never fight. (Id.) Moss went back to Alabama on July 5 (Id.), and Kirk got her own apartment on or about July 29, 1998. (Id. at 20). Moss did not seem to be abusive to Kirk (Depo. May 80.) Kirk had just ended a six-year relationship with a very abusive male, Gary Day. (Depo. May 71.)

After getting her own apartment in Columbus, Kirk went to Alabama to collect her things and bring them back to Columbus. Moss later would say that while in Alabama Kirk told him to "give it a few days" and then come back to Columbus (Interview of Moss by Sgt. Rich, at 3; Copy attached as Exhibit A). Moss hitchhiked his way to Columbus, and spent Monday, August 10 through Thursday, August 13, 1998, with Kirk at her apartment. (Id. at 5.)

On or about August 13, 1998, Kirk and Moss were at Kirk's home, an apartment located at 4324 Westport Road, in Columbus. At approximately 11:06 p.m,[1] or 2306 hours, a 911 call was received at the Franklin County Sheriff's Office Communications Center (hereinafter, Com Center). The calls that are related to this case (and any other calls received during this time) all came during "shift change", which is a busy time because the communications technicians are "switching everyone over." (Depo. Susi 33.) When the call was picked up at the Com Center, the line disconnected from the other end. Sgt. Earl P. Taylor picked up the receiver at the Com Center, and he immediately called the Kirk apartment back[2]. A female voice, later identified as that of Deborah Kirk, answered the call. She told Sgt. Taylor that she was the one who had placed the 911 call and then hung up. The exact wording of the call back to Kirk from Sgt. Taylor is as follows:

Kirk: Hello.

Taylor: Yes, this is the 911 Emergency Operator, someone dialed 9-1-1 from there and hung up. What's the problem?

Kirk: Yes, sir. I dialed and hung up. I'm trying to get the problem straight myself. It's just domestic.

Taylor: Okay. It's all taken care of then?

Kirk: Yes, sir. I hope so.

Taylor: Alrighty. Thank you.

[1] For uniformity, all times referencing the 911 calls will be reported based on the computer-generated printout from the Franklin County Sheriff's Office Communications (911) Center, and are a part of the transcripts of those calls. They are attached as Exhibit B.

[2] The computer generated time records this as being at 2306 as well.

Although it is not evident from simply *reading* the above lines, Plaintiff's expert, Dr. R. Paul McCauley, testified that after *listening* to the tape four or five times, and listening to the tone of voice, the modulation, the volume and the rapidity of speech (or, in effect, the lack thereof), he concluded (as had Sgt. Taylor) that there was no emergency. McCauley stated that a follow-up run "at some time" was sufficient. (Depo. McCauley 113, ln. 16 - 118, ln. 8.) Taylor did not send a cruiser out. He testified Kirk seemed calm, there was no need to talk in code, there was no arguing, no threats, no signs of physical violence (Depo. Taylor 50.) Taylor testified that some domestic calls just involve arguments; people not getting along, such as a Mom calling about a son who won't do as Mom wishes (Id. at 51).

At approximately 2323, or seventeen minutes after the first call, a second call was received at the Com Center from the Kirk address. This call was received by Communications Technician Marino A. Susi (hereinafter, Susi) and lasted approximately one minute and 38 seconds. Other than Susi saying "911" twice, there is no close connection between receiver and voices. Susi testified that all he could hear were a male voice and a female voice, having what sounded like a verbal argument. (Depo. Susi 29.) He determined that the call indicated a possible domestic situation and coded his "run card"[3] as a "possible 20," i.e. a possible domestic disturbance. (Id.) Susi also listed the appropriate priority to the run – a priority 3 (Id.), which means that a cruiser is to be dispatched within 10 minutes.[4] At approximately 2319, Susi filled out a run card and

[3] A "run card" is a card used by Com Center personnel to log information received on calls. The cards are then forwarded to a dispatcher for further action as is necessary.

[4] There are five (5) call priorities: Priority 1 calls involve life threatening crimes in progress. The dispatch time is "immediate," and with the permission of the street supervisor, are done with lights and sirens unless the victim may be put in danger if they are used. Priority 2 calls include, *inter alia,* accidents with injuries, incidents in progress with the potential for injury or damage. The dispatch time is immediate, but no lights or sirens are used. Priority 3 calls involve misdemeanors in progress, domestic disputes, ***no violence used***

took it over to Dispatcher Birkhead, and placed it where she could see it. (Depo. Susi 32.) Ms. Birkhead dispatched a police cruiser to the scene within 7 minutes (Depo. Susi 32), at 2327 on a possible 20 (Run Card 114620, attached as Exhibit D), which was in conformance with policy guidelines for dispatches on Priority 3 calls.

At 2331, a third call was received at the Com Center from the Kirk residence. This call was also received by Susi, and it lasted 19 seconds (Depo Susi 33.) Susi recognized it as being the same address based on memory alone. (Depo Susi 33.) Susi heard a low voice at first, and he could not understand it, so he asked "What's wrong?" (Depo. Susi 34; see also transcript of the call, Ex. B). Susi testified that the voices "were yelling and being escalated again, that she was arguing with a male party in the background...they seemed to be more argumentative with each other." (Depo. Susi 34.) Susi then stood up and got Birkhead's attention, and said, "Lisa, that Apartment 4—is going to be a good domestic." (Id.). He told her to come back and tell the dispatched officers that it was a good call—a good domestic violence call. He also told her it was a possible "8" (assault). (Id. at 34-35.) Susi said that this—the use of the word "good"—lets the dispatched officers know it's a serious call. (Id. at 35.) Susi shouted this to Birkhead because "it saved time." (Id.)

Susi testified that the communications technicians used the term "good" to describe a valid, or good offense. He testified that no one ever questioned what the communications technicians meant by it. (Id. at 79.) Despite doing considerable

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or threatened, suspicious persons, a burglary *report*, or an accident with no, or slight, injury. The dispatch must be made within 10 minutes. Priority 4 calls involve completed misdemeanor crimes, or a request for help that does not require a quick response. The dispatch must occur within 20 minutes. Finally, Priority 5 calls are service calls, or a request for a specific officer when the *caller* advises s/he can wait for the district unit. There is no time requirement for a Priority 5 call to be dispatched. A copy of these procedures is attached as Exhibit C.

overtime on his job (Id. at 49), Susi took the time to do "ride-alongs" with the police, although he wasn't out with them on a daily basis. (Id. at 80.) Susi knew that on domestic disturbance calls, there are occasions that when the officer arrives on the scene, people have left, either the male, the female, or both (Id. at 81-82.)[5]

At 2332, Franklin Township Officer David Ratliff (hereinafter, Officer Ratliff) called to say he was "en route" to the address. At 2337, he arrived on the scene on Westport Road. He went to apartment 4 and listened at the door. He did not hear or see any signs of a struggle within the apartment. Officer Ratliff knocked on the door several times, and knocked on doors of other apartments in the area and was told by neighbors that they had not heard any disturbance. Officer Ratliff returned to Apartment 4 and knocked on the door. There was no answer and Officer Ratliff cleared the scene at 2347. (Affidavit of Ratliff, Exhibit E, and the computer timeline, on Ex. B).

The following day, Ms. Kirk's body was discovered inside the apartment. Mr. Moss had left Kirk's apartment, taken her car, and driven back to Alabama where he lived. Mr. Moss was arrested there for the killing of Deborah Kirk and was transported back to Columbus, Ohio. He confessed to killing Deborah Kirk, and gave a taped statement to investigators. He hung himself inside the Franklin County Jail before being tried or convicted of the crime.

Plaintiff, as the administratrix of Deborah Kirk's estate, has sued, *inter alia*, the Franklin County Board of Commissioners; Franklin County; Jim Karnes, Franklin County Sheriff; Marino A. Susi; and Earl P. Taylor, (hereinafter, collectively County

[5] This is not to imply that every domestic disturbance call involves only one male and one female.

Defendants) in their official capacities[6] for equal protection and substantive due process violations of 42 U.S.C. § 1983 and state claims under ORC 2125.01 and 2125.02.[7]

II. STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to a judgment as a matter of law. ***Kocsis v. Multi-Care Mgmt., Inc.***, 97 F.3d 876, 882 (6th Cir. 1996). In ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, the Supreme Court explained that

> the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of evidence that the plaintiff is entitled to a verdict.

Id. at 252. The "mere possibility" of a factual dispute does not suffice to create a triable case. ***Gregg v. Allen-Bradley Co.***, 801 F.2d 859, 863 (6th Cir. 1986). To defeat summary judgment, the plaintiff "must come forward with more persuasive evidence to support [his or her] claim than would otherwise be necessary." ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.***, 475 U.S. 574, 586 (1986). If the defendant successfully demonstrates, after a reasonable period of discovery, that the plaintiff cannot produce sufficient evidence beyond the bare allegations of the complaint to support an essential element of his or her case, summary judgment is appropriate. ***Celotex Corp. v. Catrett***,

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[6] Plaintiff also sued Mr. Susi in his personal capacity. However, Plaintiff's claims against Mr. Susi personally were dismissed with prejudice, and Mr. Susi remains in the instant action only in his official capacity. A copy of the Entry of Dismissal is attached as Exhibit F. All other defendants associated with Franklin County are either county entities, or were only sued officially.

[7] Plaintiff has also named up to ten (10) John Does alleged to be agents or employees of the Franklin County Sheriff's Office. However, they have never been identified or served as of the date of this motion. Rule 15(C) of the Federal Rules of Civil Procedure allows identification of John Doe defendants only within the period of 120 days as provided by Rule 4(M). Review of the file indicates that no such identification or service has ever been effected; therefore, the suit can only proceed against the named defendants. The John Doe defendants must be dismissed from the within action.

477 U.S. 317, 325 (1986). When determining whether to reach this conclusion, we view the evidence and draw all reasonable inferences in the light most favorable to the non-moving party. ***Adickes v. S.H. Kress & Co.***, 398 U.S. 144, 157 (1970); ***Williams v. Int'l. Paper Co.***, 227 F.3d 706, 710 (6th Cir. 2000); ***Smith v. Thornburg***, 136 F.3d 1070, 1074 (6th Cir. 1998).

III. FRANKLIN COUNTY, AND MARIO ANTONIO SUSI AND EARL P. TAYLOR, AND THE FRANKLIN COUNTY BOARD OF COMMISSIONERS ARE NOT PROPER PARTIES

Initially, Franklin County should be dismissed from the within action. Franklin County is a geographical location, not a person or legal entity capable of being sued. See ***Schaffer v. Board of Trustees***, 171 Ohio St. 228, 168 N.E.2d 547 (1960) ("a county is a subdivision of the state, organized for judicial and political purposes. It is not a legal person or a separate political entity" (internal citations omitted.)). "[C]ounties... are not sui juris; they are held accountable through their elected representatives, to wit, their commissioners." ***McGuire v. Ameritech Services, Inc***., 253 F. Supp. 2d 988, 1015 (S.D. Ohio, Western Div. 2003). Boards of county commissioners are statutorily created legal entities charged with conducting the business of their individual counties and are capable of suing and being sued pursuant to O.R.C. 305.12. Therefore, the properly named legal entity for holding the county liable is the Board. The Franklin County Board of County Commissioners is already a named party herein, and therefore, naming the county as a separate defendant is redundant. Franklin County should be dismissed as a separately named defendant in the within action.

Marino Antonio Susi (hereinafter Susi) and Sgt. Earl P. Taylor (hereinafter Taylor) should likewise be dismissed from the within action, as they are named only in

their official capacities. It is well settled that a suit against a government official in his or her official capacity is the equivalent of a suit against the governmental entity itself. ***Kentucky v. Graham***, 473 U.S. 159, 165-66 (1985). Therefore, as the governmental entity at issue herein is already a named defendant, the retention of Susi and/or Taylor in their official capacities is redundant, and they should be dismissed from the within suit.

As a result, the proper viable defendants herein are the Franklin County Board of Commissioners (hereinafter the Board) and Franklin County Sheriff Jim Karnes in his official capacity. With regard to the Board, however, they are improperly named in the within action. At Paragraph 2 of her Complaint, Plaintiff alleges that "Earl Taylor was an employee and/or agent of the Defendants Franklin County Board of Commissioners..."

This is clearly in error. Deputies and employees of the Communications Center are employees of the Franklin County Sheriff's Office, not of the Franklin County Board of Commissioners. See R.C. 311.01 (the Sheriff is an independently elected official), and Depo. Sheriff Karnes, at 12 ("I would say it [the 9-1-1 Center] falls under my jurisdiction, yes, sir, for ours, not for the city."), and 13 ("I would say it probably would be within my authority to do so [i.e. terminate the 9-1-1 service altogether]). The Board does not employ deputies and does not employ any personnel that work within the Comm Center. R.C. §311.04 provides "the *Sheriff* may appoint, in writing, one or more deputies." (Emphasis added.) As Commissioner Shoemaker testified, "We [the commissioners] have no responsibility as it deals with the administration of the 9-1-1 center." (Depo. Shoemaker, 9).

A board of county commissioners is a creature of statute. The powers and duties of the Board are promulgated in Title 3 of the Ohio Revised Code and it has only that

authority either granted to it by statute or that which may reasonably be inferred there from. See Rev. Code §305.12, and ***Geauga County Bd. of Comm'rs v. Muss Rd. Sand & Gravel,*** 67 Ohio St. 3d 579, 582-583 (1993). The powers and duties inherent in running a communications center do not fall to the Board, but rather are charged to and executed by the duly elected sheriff.

By law, the Board had nothing to do with the operation of the 911 Com Center. As noted above, the Board has no authority over or input into the daily affairs, operations or policies of the Comm Center (or the Franklin County Sheriff's Office in general) and exercises no control over either. The Board must, as a matter of law, be dismissed as a party from the within action.

IV. PLAINTIFF'S 42 U.S.C. §1983 CLAIMS AGAINST THE COUNTY DEFENDANTS

A. Plaintiff's § 1983 Claims: General Considerations

42 U.S.C. §1983 provides in pertinent part that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress***

The United States Supreme Court has stated to establish a claim under 42 U.S.C. § 1983:

> [t]he plaintiff must prove that (1) a person (2) acting under color of state law (3) subjected the plaintiff or caused the plaintiff to be subjected (4) to the deprivation of a right secured by the Constitution or laws of the United States.

City of Oklahoma City v. Tuttle, 471 U.S. 808, 829 (1985).

FSCO cannot be held liable under §1983 unless officials acted pursuant to a policy or procedure of the County that caused Plaintiff to be subjected to the deprivation of a right secured by the Constitution or laws of the United States that injured Plaintiff. Put another way, Plaintiff cannot hold a government entity liable for the acts of an agent based on *respondeat superior* alone**.** ***Leatherman v. Tarrant Co.***, 507 U.S. 163 (1993); *see also* ***Monell v. Dept. of Social Services***, 436 U.S. 658 (1978) (state or local governments are only "person[s]" subject to §1983 liability when a policy or custom of that government causes the deprivation of a plaintiff's federally protected rights).

Courts interpreting ***Monell*** have held that a custom or practice that can give rise to municipal liability under §1983 must be "persistent and widespread" so that it has become "so permanent and well-settled as to have the force and effect of law." ***Jane Doe "A" v. Special School District of St. Louis County***, 901 F.2d 642. 646 (8th Cir. 1990). "[P]roof of a single, isolated incident of unconstitutional activity generally is not sufficient to impose municipal liability under ***Monell***." ***Wideman v. Shallowford Community Hosp., Inc.***, 826 F.2d 1030, 1032 (11th Cir. 1987) (internal citations omitted). Accord, ***Rodriguez v. Avita***, 871 F.2d 552, 555 (5th Cir. 1989), cert. denied sub nom ***Rodriguez v. Brownsville***, 493 U.S. 854 (1989).

This policy, custom, or procedure must be a deliberate and conscious choice taken by a decision maker with final authority. ***Pembaur v. City of Cincinnati***, 475 U.S. 469 (1986). Additionally, this policy must be the "moving force" that animated the government officials' behavior that resulted in the constitutional violation. ***Molton v. City of Cleveland***, 839 F.2d 240 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1345.

Plaintiff asserts that the County Defendants discriminated against Kirk and deprived her of her due process and equal protection rights in violation of the 14th Amendment to the United States Constitution. Plaintiff's claims fail.

Initially, it must be noted that there is no policy within FCSO to deprive individuals of their due process or equal protection rights. To the contrary, it is the policy of the FCSO to uphold the rights of all individuals – prisoners and citizenry alike. A copy of the regulation, numbered AR102, is attached as Exhibit G.

B. Plaintiff's Equal Protection Claim

Plaintiff alleges that the County Defendants violated Kirk's rights pursuant to the Equal Protection Clause of the 14th Amendment to the United States Constitution. Plaintiff argues that Defendant's policies of "differentiat[ing] their responses to certain calls" and "categoriz[ing] calls regarding domestic disturbances as deserving of lesser attention than other calls" (Complaint, Par. 21) "discriminates against women" because "the overwhelming majority of emergency calls arising out of domestic disturbances are calls placed by women." (Complaint, Par. 22.)

The Equal Protection Clause provides "that the government treat similarly situated persons in a like fashion." ***City of Cleburne v. Cleburne Living Center***, 473 U.S. 432, 438 n26 (1985). It is axiomatic that before proceeding to any further analysis of her claim, Plaintiff must demonstrate that Defendants treated Kirk differently than other similarly situated people were treated. There is no such evidence in this case.

Plaintiff alleges that domestic disturbance calls receive a lower priority than other calls. However, even if domestic disturbance calls receive a lower priority than other calls does not demonstrate any differential treatment of similarly situated people.

Pursuant to policy, all domestic disturbance calls receive the same priority rating – 3. This is true regardless of whether the call is place by a man or a woman. There is no differential treatment.

To the extent Plaintiff may argue that differential treatment is demonstrated in the mere fact that domestic disturbance calls are treated differently from calls regarding an armed robbery in progress or some other call, her distinction fails to demonstrate a constitutional violation. It is important to note at this juncture that Plaintiff uses two terms in formulating her Complaint: domestic disturbance (Complaint, Pars. 21, 22, and 23) and domestic violence (Complaint, Par. 22). Although Plaintiff seemingly uses these terms interchangeably, there is a very important distinction between them. Domestic disturbance calls, pursuant to the FCSO policy, are those calls relating to a domestic situation where no violence is used or threatened. These calls are given a priority rating of 3. But domestic violence calls – calls where violence is used or threatened - are another matter entirely. Domestic violence calls are treated like any other violence calls[8] and are dispatched as a higher priority – either a 1 or 2, both of which require an immediate dispatch.

Any attempt by Plaintiff to argue that calls regarding domestic violence receive a lower priority rating than other calls regarding other types of violence is simply not true. The policy states, and the communications technicians testified, that calls regarding a domestic disturbance receive a priority rating of 3. However, this is only the case where there is "no violence used or threatened." If violence is used or threatened, domestic violence calls – as distinguished from domestic disturbance calls by the mere presence of

[8] As will be discussed *infra*, at 12-13, there is no distinction between calls regarding domestic violence and calls regarding any other kind of violence. If violence is used or threatened, an immediate dispatch is made pursuant to policy.

violence or a threat thereof – are given a higher priority rating of either a 1 or a 2, depending on what the situation warrants. (See Depo. Swanson 54; Depo. Rabe 26; Depo. Taylor 46; Depo. Susi 122.)

As discussed above in footnote 4, all calls received by FCSO 911 Comm Center are assigned one of five priority ratings. It is clear from a review of these classifications, that crimes involving a life threatening situation and/or the potential for injury receive a priority rating of 1 or 2. The only practical difference between this distinction is that a priority 1 call warrants an officer, when appropriate[9] use lights and sirens in responding. Both priority 1 and 2 calls receive immediate dispatch. Therefore, it is the policy of FCSO to immediately dispatch all calls relating to violent situations that pose a risk of injury – whether they are related to a domestic situation or not. There is no differential treatment within the policies and practices of the FCSO. Calls placed by men and women alike which regard a domestic disturbance receive a priority rating of 3. Calls placed by men and women alike which regard a domestic situation but involve violence receive a priority rating of 1 or 2. Calls placed by victims of crimes involving violence – whether they are from a domestic violence situation or other types of violence—receive a priority rating of 1 or 2. Accordingly, Plaintiff cannot demonstrate that Defendants have treated similarly situated individuals in a different manner than Kirk was treated.

Even if Plaintiff could demonstrate differential treatment, however, her claim for a violation of Kirk's equal protection rights would still fail.

> The initial burden of proving a gender discrimination claim is on Plaintiff. Plaintiff must show, 1) either that the domestic violence policy was

[9] Sirens are not to be used in a priority 1 dispatch if their use "may put a crime victim into more danger" (policy). This can be true of domestic violence situations. Plaintiff's own expert testified that the use of sirens in a domestic violence situation is not always advisable as their use often escalates the risk of violence. (Depo. McCauley 107.)

> facially discriminatory or disproportionately impacted women; and 2) that the policy was intentionally discriminatory.

Stevens v. Trumbull County Sheriff's Department, 63 F. Supp. 2d 851, 856 (Northern District of Ohio 1999), citing ***Personnel Administrator of Massachusetts v. Feeney,*** 442 U.S. 256, 274 (1979). The Feeney Court went on to state:

> When a statue gender-neutral on its face is challenged on the ground that its effect upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 274, (1979), citing ***Arlington Heights v. Metropolitan Housing Dev. Corp***., 429 U.S. 252 (1977).

Here the classification at issue – differentiating between calls that come into the comm. center – is not based on gender. Gender of the caller is nowhere a distinction in what type of priority rating a calls receives. Therefore, as Plaintiff has alleged that women are more negatively impacted by Defendants priority ratings because women place the majority of domestic calls (Complaint, Par. 22), this case must be examined pursuant to the second inquiry delineated by the Supreme Court. It must be determined whether the adverse effect reflects invidious gender based discrimination.

In ***Feeney***, the Supreme Court analyzed a Massachusetts statute that gave hiring preference to veterans qualifying for state civil service positions ahead of any qualifying non-veterans. The Court noted that because the overwhelming majority of veterans were male, the statute inevitably operated to exclude women. However, the Court held that notwithstanding impact the non-invidious purpose of the statute was clear. The Massachusetts legislature was distinguishing between veterans and non-veterans, not

between men and women. The Court went on to state that this being the case, "the dispositive question, then is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veteran's preference legislation." ***Feeney, supra,*** at 276.

The policy at issue herein likewise posits a distinction between violent and non-violent calls, not between violence calls and domestic violence calls, and not between calls placed by men and calls placed by women.

Therefore, in order to impose liability on Defendants, Plaintiff must demonstrate that Defendants had a gender based discriminatory purpose in formulating their policies. In fact, proof of discriminatory intent or purpose is a necessary prerequisite to any Equal Protection Clause claim. ***Hernandez v. New York*** (1991) 500 U.S. 352, 359-60. Plaintiff cannot meet this burden. There is no evidence that in formulating call priorities and response times Defendants in any intended to discriminate against women.

Plaintiff alleges in her Complaint that Defendant's conduct was deliberately discriminatory. (Complaint, Par. 22.) However, this conclusory statement is not sufficient to demonstrate that Defendants acted with a discriminatory purpose. ***McDonald v. Union Camp Corp***., 898 F.2d 1155, 1162 (6th Cir. 1990) ("Mere conclusory allegations are not sufficient to withstand a motion for summary judgment.") Although disproportionate impact may be one factor in showing a purpose to discriminate, it is not the sole touchstone of invidious racial discrimination. ***Navarro v. Block***, 72 F.3d 712 (9th Cir. 1995), citing ***Washington v. Davis*** (1976) 426 U.S. 229, 242. Other factors which can demonstrate intent include the historical impact of the decision, departures from normal procedures, legislative or administrative history, and contemporary statements by

members of the decision making body. ***Village of Arlington Heights v. Metropolitan Housing Dev. Corp***., 429 U.S. 252, 270-271 (1977). It is not enough to prove that the policy maker could foresee the discriminatory consequences of the decision. ***Feeney***, at 279. Here, Plaintiff cannot demonstrate any discriminatory intent in Defendants' classification of calls received by the Comm Center.

Finally, Plaintiff states that "Defendants' distinction with respect to their handling of domestic disturbance calls furthers no compelling, legitimate government interest, and it is not rationally related to any governmental purpose."[10] (Complaint, Par. 23.) While it may be the burden of a Defendant in a gender discrimination suit to demonstrate that its policy *substantially relates to an important governmental interest* (***Craig v. Boren***, (1977) 429 U.S. 190, 197), that burden does not come into play until after a Plaintiff has met her initial burden of demonstrating that a policy was facially discriminatory or disproportionately impacted women, and that the policy was intentionally discriminatory. ***Personnel Administrator of Massachusetts v. Feeney***, 442 U.S. 256, 274 (1979). As demonstrated above, Plaintiff herein cannot meet her initial burden. She cannot show that Defendants treated similarly situated persons in different fashions; she has not demonstrated that any of Defendants' policies were implemented because of a discriminatory purpose. Accordingly, Plaintiff's equal protection claim fails as a matter of law.

[10] This is the standard cited by Plaintiff. Since the County Defendants argue that the within case can be resolved without reaching this prong of an equal protection analysis, Defendants have merely quoted Plaintiff's cited standard. However, the County Defendants dispute that this is the proper level of scrutiny for the issues presented herein and reserve the right to argue such if it becomes necessary.

C. Plaintiff's Substantive Due Process Claim

Plaintiff's second claim under §1983 alleges a substantive due process violation: the County Defendants established and operate what Plaintiff calls a constitutionally deficient 911 emergency response system. Complaint, at ¶¶25, 32. Plaintiff claims that this alleged failure increased the risk that Deborah Kirk would be harmed or killed by Marvin Moss.

Plaintiff's claims are fundamentally flawed, and because of those fundamental flaws, the County Defendants respectfully submit that summary judgment is appropriate regarding Plaintiff's substantive due process claim.

To summarize the argument, Plaintiff's claim regarding a substantive due process right is fundamentally flawed for the most basic of reasons: Plaintiff has no constitutional right to a rescue system, flawed or otherwise. ***DeShaney, infra.*** Because there is no such constitutional right, Plaintiff simply has no claim that entitles her to recover against the County Defendants. Second, Plaintiff claims that Officer Ratliff's leaving the scene after knocking on Kirk's apartment door without taking further action emboldened Moss into acting violently towards Kirk. Whatever merit the emboldening theory may have against the Franklin Township Police Department, it can have no applicability to the County Defendants: it is their duty to dispatch officers to scenes. Regardless of their level of training, the basic premise of a 911 system is that it sends assistance, which it did in this case. 911 dispatchers simply cannot choose *not* to dispatch officers; they are required to dispatch officers on domestic disturbance and domestic violence calls. It is, with all due respect, a patent absurdity to require 911 operators and dispatchers to understand that (much less "how") someone who is not even

on the other end of the telephone line may be empowered to act not only by sending an officer to the scene, but even by answering the call at all[11]. Finally, pursuant to ***Kallstrom v. City of Columbus***, 136 F.3d 1055 (6th Cir. 1998) and its progeny, even assuming the existence of a constitutional claim, in order to create a duty to protect, an officer's action would have to "create *or increase the risk* that an individual will be exposed to *private acts of violence*. ***Kallstrom, supra,*** at 1066 (Emphasis added); see also: ***Davis v. Brady***, 143 F.2d 1021, 1025 (6th Cir. 1998), and ***Gazette v. City of Pontiac***, 41 F.3d 1061, 1065 ("*increase* the risk of vulnerability to private acts of violence beyond the level it would have been...absent state action.") (Emphasis added).

We start with fundamental law: In order to establish a 42 U.S.C. §1983 claim, Plaintiff must show that she was deprived of a federal right by a person acting under color of state (or territorial) law. ***Gomez v. Toledo***, 446 U.S. 635, 640 (1980), cited in ***Jones v. Union County, Tennessee***, 296 F.3d 417 (6th Cir. 2002). See also: ***Baker v. McCollum***, 443 U.S. 137 (1979).

Plaintiff alleges, and Defendants of course admit, that the Franklin County Sheriff's office operates a 911 emergency system. Thus, the question arises, if a governmental entity chooses to operate an emergency response system such as 911, are they constitutionally required under substantive due process to operate it in a competent manner?

The initial point of reference in answering this question is provided by ***DeShaney v. Winnebago County Department of Social Services***, 489 U.S. 189 (1989). In ***DeShaney***, the Supreme Court addressed the claims of a child, Joshua DeShaney, who sustained injuries inflicted by his natural father. The Department of Social Services of

[11] See deposition of Dr. Meloy, infra.

Winnebago County (DSS) returned the child to his father after the father agreed to cooperate with DSS. A caseworker made regular visits to the home, and saw a number of suspicious injuries on the child's head, that the child was not enrolled in school, and that the father's girlfriend had not left, as had been agreed on previously. The caseworker noted these things, but did nothing else. A local hospital reported to DSS that the child was treated there; she was believed to have been physically abused. On the next two visits, the caseworker was told the child was too ill to see her, and *still* the caseworker did nothing. Finally, the child was beaten so severely he was left profoundly retarded, a condition from which he will never recover. ***DeShaney, supra***, at 193-194.

Joshua DeShaney brought suit through his guardian against DSS. In upholding the granting of summary judgment, the Supreme Court held that a governmental entity has no obligation under the Due Process Clause to protect citizens from the violent acts of private persons. It is to be noted that DSS did the affirmative act of returning Joshua to his father, but the Court explicitly rejected the idea that this met the state-action requirement, stating that "when it [DSS] returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua." ***Id***., at 201. Thus, even if an affirmative act existed on the part of the County Defendants, such an act would have to place Kirk in a *worse* position than she would have been had the County not acted at all.

DeShaney noted that it could well be that by voluntarily undertaking to protect Joshua against danger it played no part in creating that danger, the State acquired a duty

under state tort law (depending on the state) to provide him with adequate protection. But the Court explicitly rejected that the Due Process Clause mandated such protection, holding that there was no constitutional duty of protection, and that its failure to do so—"however calamitous in hindsight"—did not violate the Due Process Clause. ***Id.*** at 202.

The Supreme Court also held that

> If the Due Process Clause does not require the State to provide its citizens with particular protective services, *it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.* As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

Id. at 196-197. (Emphasis added).

This distinction between state tort law and federal constitutional law was duly noted in ***Brown v. Commonwealth of Pennsylvania Department of Emergency Services Training Institute***, 318 F.2d 473 (3rd Cir. 2003). There, Plaintiffs brought suit after their one-year old son choked on a grape and asphyxiated, alleging that the emergency medical technicians (EMTs) failed to arrive quickly enough after help was summoned: three telephone calls and ten minutes went by before help arrived. ***Id.*** at 475-476.

The ***Brown*** court noted, as the County Defendants do here, that the threshold question is whether a plaintiff has sufficiently alleged a deprivation of a right secured by the Constitution. In citing ***DeShaney***, the court quoted the passage directly quoted above, ***DeShaney,*** at 196-197, and then added the following:

> It is a basic tenet of tort law that although an individual generally has no duty to rescue, once voluntarily undertaken, a rescue must not be performed negligently. See, e.g. Restatement (Second) of Torts 314, 323 (1965). One might infer from the general rule that, although the State is not constitutionally required to provide rescue services, once the State undertakes a rescue,

> federal constitutional law requires that it do so competently. ***Such an inference, however, incorrectly conflates state tort law and federal constitutional law.*** The Supreme Court has repeatedly stated that "the Due Process Clause of the Fourteenth Amendment...does not transform every tort committed by a state actor into a constitutional violation." ***DeShaney***, 489 U.S. at 202 (collecting cases). Although state tort law might provide a remedy for a state's negligent rescue attempt, it neither logically nor legally follows that federal constitutional law must do the same.

Brown, supra, at 477-478. (Emphasis added.)

The ***Brown*** court then asked, and answered, the question of whether the Due Process Clause requires states to provide adequate or competent rescue services when they have chosen to undertake these services. That court noted holdings from several other circuits that answered in the negative, citing ***Salazar v. City of Chicago***, 940 F.2d 233, 237 (7th Cir. 1991) ("Government generally has no constitutional duty to provide rescue services to its citizens, and if it does provide such services, it has no constitutional duty to provide competent services to people not in its custody.") and ***Bradberry v. Pinellas County***, 789 F.2d 1513, 1517 (11th Cir. 1986) ("The Constitution, as opposed to local tort law, does not prohibit grossly negligent rescue attempts nor even the grossly negligent training of state officers."). The ***Brown*** court also noted ***Archie v. City of Racine***, 847 F.2d 1211 (7th Cir. 1988) (en banc); and ***Jackson v. City of Joliet***, 715 F.2d 1200 (7th Cir. 1983). After citing those cases, the ***Brown*** court concluded that

> We agree with the reasoning of these decisions and join these Circuits in holding that there is no federal constitutional right to rescue services, competent or otherwise. Moreover, because the Due Process Clause does not require the State to provide rescue services, it follows that we cannot interpret that clause so as to place an affirmative obligation on the State to provide competent rescue services if it chooses to provide them.

Brown, supra, at 478.

Plaintiff has offered the theory that the act of Officer Ratliff in approaching and knocking on the door of Deborah Kirk's apartment, and then leaving without taking further action "emboldened" Moss to kill Kirk. The Sixth Circuit has stated in ***May v. Franklin County Board of Commissioners***, 59 Fed. Appx. 786, 2003 U.S. App. Lexis 4622, that

> May argues that the facts pled in her complaint establish that Ratliff's conduct increased the risk that Kirk would be deprived of life and liberty in violation of the substantive due process clause. She first says Ratliff's behavior—going to the door, knocking, and then leaving—emboldened Moss because it diminished his fear of arrest. (Footnote omitted). Second, she says the Township's operation of a 911 emergency response system has displaced other means by which victims of domestic violence protect themselves and that if Kirk had not relied on Ratliff, she might have called other friends or family for help...
> According to the facts alleged, Ratliff's actions emboldened Moss and so increased Kirk's vulnerability to harm. She would have to prove at trial that these actions in fact emboldened Moss, but that is a question for the jury to decide. If May could show culpability, then she could proceed to a jury on that basis.

Id. at Fed. Appx. 792-93, 2003 U.S. App. Lexis 4622 at * 17-19.

The Sixth Circuit has already dismissed the "displacement" theory of Plaintiff. That is, that the adoption by the Sheriff of a 911 system "displaced" other means of help. Plaintiff makes this claim in her Complaint, at ¶24. The Sixth Circuit, in ***May***, ***supra***, rejected this claim:

> May's second argument, that the 911 system displaced other means of help, was rejected in ***DeShaney***...Thus May has not made a case for a violation of a constitutional right due to a special relationship.

Id., at 59 Fed. Appx. 793, 2003 U.S. App. Lexis 4622, at *18-19.

Thus, based on the claims she brings in her Complaint, for Plaintiff to state a cause of action under §1983, there would have to be some manner in which the alleged

failure to provide specific information to Ratliff somehow makes the County Defendants liable, not to Ratliff, but to Kirk.

But the legal decisions cited previously make it abundantly clear that there simply is no *constitutional* duty on the part of the County Defendants to operate an efficient 911 system.[12] ***DeShaney, supra; Brown, supra.*** Because no such duty exists, there is no constitutional tort that exists in this case, and therefore, there can be no liability on the part of the County Defendants to Plaintiff.

The Sixth Circuit noted that *Ratliff* may have had a duty to protect Kirk from Moss; there is, and there can be, no such conclusion regarding the County Defendants.

The County Defendants would respectfully note that the Franklin Township Police Department is a department of a separate political and legal entity: Franklin Township. Franklin Township and Franklin County are two distinct, separate entities, and, of course, were sued in this action as such. As noted *supra*, Franklin County operates the 911 system, and dispatches officers who, depending on the location of the call, are either township officers or deputy sheriffs.

It is the duty of the communications technicians to forward information to the dispatcher(s) in the 911 Communications Center, and it is the duty of the dispatcher to contact, or dispatch, officer(s) to the scene of the situation.[13] The County Defendants respectfully submit that when they receive emergency calls in the 911 Com Center, they cannot realistically be expected to know that by dispatching someone, they might be "emboldening" someone to commit a crime. They cannot know who may be listening in,

[12] The County Defendants take considerable issue with Plaintiff regarding the workings of its 911 system. However, the debate is legally meaningless in terms of liability, as has been shown.

[13] Not every 911 call is an "emergency", although they are, based on written policy, to be treated as such. Calls come in for various reasons, including cats in trees, information requests, and the like.

or who may be at the scene when the police arrive. Even more importantly, they are not in a position to conduct an investigation at the scene: they are in a communications center, often miles away, and in addition, many communications technicians are civilians, not deputy sheriffs.[14] Accordingly, the County Defendants respectfully submit that they cannot be held liable based on the theory of "emboldening."

Emboldening is a concept provided by Plaintiff's expert, Dr. Reid Meloy. Setting aside the point that Dr. Meloy, when challenged, could not produce a scientific basis for "emboldening", or, "enhancing" (Depo. Meloy 60-61 - he immediately switched to "negative reinforcement"), the more important fact that Dr. Meloy discussed regarding "emboldening" is shown by the following exchange:

> Q. (by Ms. Boyd) Is there any necessity for the person allegedly giving the permission to have any cognitive understanding that they are giving that permission?
>
> A. (Dr. Meloy). Absolutely not.
>
> Q. Okay. It's all perception?
>
> A. It's all perception.

(Depo. Meloy 97.)

The Sixth Circuit held in ***Kallstrom*** that even if the police created or increased the risk of physical violence, they *also* "must have known or clearly should have known that its actions specifically endangered an individual." ***Id.*** at 1066. It is evident from Dr. Meloy's own testimony that knowledge on the part of the police was "absolutely" not essential, and there certainly is no indication that the police were aware of it. And if the

[14] See also: ***Cartwright v. City of Marine City***, 336 F.3d 487 (6th Cir. 2003), where the Court noted the "unavoidable liability" problem. Failing to dispatch, or dispatching based on a complete lack of knowledge as to whether some third party might be "emboldened", places the communications technician in a "Catch-22" situation, much like the ***Cartwright*** court noted about the officers in ***Bukowski*** and the officers in ***Cartwright***, both of whom could have faced civil lawsuits regardless of what they did.

police were absolutely not required to have any cognitive understanding, *a fortiori* the County Defendants could not be required to have any. Based on the requirements of ***Kallstrom***, ***supra,*** there can be no liability here based on the "emboldening" theory.

The Sixth Circuit, in this case, took the facts alleged in the Complaint and asked whether Ratliff had a duty to protect Kirk from Moss, holding that this was a jury question. The County Defendants respectfully submit that since the "emboldening" theory cannot apply to them, and since there was no *constitutional* tort involved vis a vis them and Deborah Kirk, there can be no doubt but that no obligation on the part of the communications technicians, or any of the County Defendants, existed to protect Kirk from Moss. ***DeShaney, supra; Kallstrom, supra; Brown, supra.***

Even if such an obligation to protect existed, there was nothing in what transpired in the Com Center that would constitute an affirmative act under ***DeShaney*** or ***Kallstrom***. Plaintiff argues that Sgt. Taylor failed to dispatch a cruiser after he followed up a hang up call with a call back to see what the problem was. He was assured that things were all right by Kirk, who stated that she was the one who made the call.

Marino Susi, the communications technician who took the subsequent two calls, also did not take any affirmative acts to increase Kirk's risk of harm. He failed to do a call back, and was later disciplined for that failure by the Sheriff. Lisa Birkhead, the dispatcher, failed to convey the negative results of a callback to Officer Ratliff.

Finally, even if we assume the existence of a Constitutional violation; i.e. that Plaintiff did, despite the holding of ***Deshaney*** and its progeny, have the right to a competent 911 system, and even if we assume that somehow, the County Defendants did some act on August 13, 1998 that would constitute an affirmative act that would have put

Kirk in a worse position, the plain fact is that the communications technicians and the dispatcher, and thus, the County Defendants, took no act which either *created* or *increased* the risk that Kirk *would be* exposed to private acts of violence. ***Kallstrom, supra,*** at 1066. (Emphasis added). See also: ***May***, ***supra***, at 59 Fed. Appx. 792, 2003 U.S. App. Lexis 4622, at *16. In addition, this Court's attention is respectfully directed to ***Cartwright v. City of Marine City***, 336 F.3d 487 (6th Cir. 2003):

> The question is not whether the victim was safer *during* the state action, but whether he was safer *before* the state action than he was *after* it. See ***DeShaney***, 489 U.S. at 201.

Id. at 493. (Emphasis in the original.).

The evidence adduced during discovery indicates that Kirk met her death at the hands of Marvin Moss. That is literally true. The autopsy report, attached as Exhibit H, indicates in the "Final Diagnosis" that Kirk died as a result of "Blunt trauma to the neck with cutaneous abrasion and contusion, fractures of the hyoid bone and the thyroid cartilage, and contusions of the neck musculature." Death would have occurred "within minutes," according to the autopsy report.

Moss, in his statement to the police, explained how Kirk's death occurred. The Court is respectfully directed to note how his explanation fits with the findings reported by Dr. Norton.

The first statement from Moss was a written statement given to Detective Dwight Edger, of the Madison County (Alabama) Sheriff's Department. This statement is marked as Exhibit I. Moss wrote, in pertinent part:

> On Thursday, August 13, 1998, Deborah Kirk and myself were at her apartment at 4324 Westport Road, apartment #4...At or about 10:30 –11:30 p.m. Deborah and I were drinking (both of us, heavy

> drinking[15]), and we were getting drunk and we started arguing and fighting about everything that went on during the evening. Deborah and I started cussing and pushing each other around in the apartment and she started kicking and hitting me and I also kicked and hit her. She told me to leave and I said no and I pushed her down on the bed and she got up and took the lamp and busted me in the head and my left leg above the kneecap got cut open also and scratches on my arms also. I seen that I was bleeding bad and I told her to leave me alone and I would get my glasses and clothes and leave but, Deborah kept hitting me with the lamp and I put my hands around her throat and pushed her over the bed and I also went with her and I was bleeding profusely all over her and the floor and I told her I was getting up and she kicked me in the groin and I lunged my hand into her throat hard, and I passed out, I believe from the bleeding and being drunk.

Moss gave a taped statement to Sgt. Rich while being driven back to Columbus from Alabama on August 19, 1998. In that statement, see Exhibit A, he states that he and Kirk were arguing, and after it cooled down for a minute, Moss got undressed and went to bed, and Kirk came into the bedroom and did the same. (Statement, at 6). Moss said he leaned over to kiss Kirk, and "she hauled off, slapped the shit out of me," and Moss asked why she did that, and she ordered Moss out. Moss started getting up on the side of the bed, and Kirk hit him again, and Moss asked why she was doing this. Kirk said that she was leaving the room, but when she got back, he'd better be gone. Moss said his glasses were missing, he got mad, popped more of her pills, got another beer, drank a couple of beers and took a shot of vodka. (Id. at 6-7.) Moss places the time of the 911 call about the same time he is looking for his glasses and drinking beer and vodka.[16] Moss says he didn't remember the 911 call, but he does say he yanked the phone out of the wall, and told her to get him his glasses and he would get the hell out. They started yelling and cussing again, threw up each other's past at each other, she slapped him and

[15] The Toxicologist's report presented Kirk with a BAC of .11, which is beyond the legal limit of .10, as that limit existed in 1998.
[16] Moss erroneously calls it between 10:30 and 11 p.m. (Id. at 7.)

he pushed her, then she got a glass lamp and hit him with it, "busted my head wide open..." (Id. at 8.) They scuffled and fought, and Moss tells Kirk to just leave him alone, he'd try to find his glasses and get dressed and leave. Then he heard the knock on the door; neither said anything, and she grabbed him by the genitals and "thrusted them real hard, I mean she just yanked real hard, and I don't know if I crushed her windpipe or what, but...I just slammed them and I was bleeding, there was blood everywhere, blood all over Debbie, blood was all over me and I thrust my hands at her and then I tried to move again and she'd kneed me in my genitals." (Id.) The next thing Moss knew he blacked out.

Moss said he washed the blood off Debbie, put the rag on the sink, covered up Debbie with the blankets, and left.

The point of this is not to say that Moss gave a 100% accurate account of what occurred, of how Kirk died.[17] The point is to note what is obvious: that before the 911 call Moss was hitting Kirk, during the 911 call he was hitting her, and after the 911 call he was hitting her. In other words, the County Defendants neither created nor increased the risk that Kirk would be exposed to private acts of violence. *They were already occurring*. The fact that at a point after the 911 calls she died does NOT mean the risk of private acts of violence increased: Moss slapped her, hit her for quite some time, and in the end, two of his thrusts at her throat (where the hyoid bone is located), broke that bone and, according to the autopsy report, killed her.

To quote the popular statement in ***Bowers v. DiVito***, 686 F.2d 616, 618, quoted in ***Kallstrom,*** at 1066, liability will exist where a person "put[s] a man in a position of

[17] Dr. Meloy testified that the suicide letter of Moss was "very detailed, and it's also very consistent with other evidence in the case, which gives it more validity as a document. (Depo. Meloy 33.) In addition, in the final 911 call from Kirk, she did say that she did not have Moss' glasses.

danger from private persons and then fail to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." But that did not happen here. Deborah Kirk was in a position of danger from Moss before, during, and after the communications technicians received her calls. The County Defendants did not put her is a worse position than she already was. Dr. Meloy testified that there was escalating violence *prior to* the knock on the door by the police officer. (Depo. Meloy 82).

Kallstrom also points out that even if the County Defendants created or increased the risk of physical violence, they *also* "must have known or clearly should have known that its actions specifically endangered an individual." ***Id***. There is simply no possible way that a dispatcher and two communications technicians, who are miles away, knew or clearly should have known that anything they did emboldened Moss to take the actions he took.

Based on all the foregoing, Plaintiff's claim of a substantive due process violation is without merit, and the County Defendants are entitled to summary judgment on that claim.

V. PLAINTIFF'S STATE LAW CLAIMS

In her First Amended Complaint, Plaintiff has brought a wrongful death state law claim against the County Defendants. The County Defendants respectfully submit that they are immune from any liability regarding Plaintiff's state law claims. The Ohio Supreme Court, in discussing the Political Subdivision Tort Liability Act, as codified in Chapter 2744, noted that the general rule as stated in R.C. 2744.02(A)(1), is that "political subdivisions are not liable in damages." ***Hubbard v. Canton City School***

Board of Education (2002), 97 Ohio St. 3d 451, 453, quoting ***Greene Cty. Agricultural Soc. v. Liming*** (2000), 89 Ohio St. 3d 551, 556-557.

The Ohio Supreme Court explained that a three-tiered analysis is required to determine whether a political subdivision should be allocated immunity from civil liability. ***Id***., citing ***Cater v. Cleveland***, 83 Ohio St. 3d 24, 28 (1998).

The first step is whether the governmental entity constitutes a political subdivision and whether it exercises a governmental function. Defendants respectfully submit that there is no argument that the first step is met. A sheriff may be deemed a county official for purposes of imposing liability under 42 U.S.C. §1983. ***Pembaur v. City of Cincinnati***, 746 F.2d 337 (6th Cir. 1984), rev'd on other grounds, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed. 2d 452. That a 9-1-1 dispatching station is a governmental function is evident from R.C. 2744.01(A)(2)(a), which defines governmental functions to include "The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection."

Because a governmental function is being performed by a governmental entity (the Sheriff's office), the general rule of governmental immunity applies, unless one of the five exceptions to that immunity overcomes the fact of immunity. The five exceptions are listed in R.C. 2744.02 (B) (1-5), and include the following:

> 1. Negligent operation of a motor vehicle upon the public roads by an employee acting within the scope of that employee's employment and authority.
>
> 2. Negligent performance of acts by employees engaged in proprietary functions.
>
> 3. Failure to keep public roads, bridges and the like open, in repair, and free from nuisance.

> 4. Injury, death or loss that is caused by negligence of employees and that occurs within or on the grounds of certain buildings used for governmental functions.
>
> 5. Any other circumstance where liability is expressly imposed upon the political subdivision by a section of the Revised Code. Liability may not be imposed merely because a responsibility is imposed on a political subdivision or because a political subdivision may sue or be sued.

It is apparent that the first three exceptions to the rule of immunity do not apply. County Defendants also state that they are not aware of any other statute imposing liability under (5). In fact, and as will be discussed ***infra***, there is a statute, R.C. 4931.49, that specifically and additionally immunizes them from liability.

Plaintiff may attempt to argue that Subsection (4) applies; however, it has no application herein. The statute is clear: liability only attaches for ***injury*** (or death or loss of property) that is ***caused*** by the negligence of their employees and that ***occurs*** within or on the grounds of buildings used for a governmental function**.**

In ***Hubbard v. Canton City School Board of Education***, 97 Ohio St. 3d 451 (2002), the Ohio Supreme Court expressly stated:

> We therefore hold that the exception to political subdivision immunity in R.C. 2744.02(B)(4) applies to all cases *where an injury resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function.* The exception is not confined to injury resulting from physical defects or negligent use of grounds or buildings. Since the injuries claimed by plaintiffs were caused by negligence occurring on the grounds of a building used in connection with a governmental function, R.C. 2744.02(B)(4) applies and the board is not immune from liability.

Emphasis added.

The clause "resulting from the negligence of an employee of a political subdivision" is a clause that modifies the word "injury." The only grammatically correct way to read this sentence is to acknowledge that the injury must occur within or on the grounds of buildings that are used in connection with the performance of a governmental function. It is the injury that occurs on the grounds. This is, of course, also in complete harmony with the wording of the statute itself.

In support of this interpretation, this Court's attention is also directed to ¶9 of the Supreme Court's opinion:

> R.C. 2744.02(B)(4) is applicable to the case at bar *because the alleged sexual assault occurred in a school building*—i.e., a building used in connection with a governmental function—*and (B)(4) specifically addresses negligent conduct within or on the grounds of such a building.*

Id., at 453. (Emphasis added).

Defendants are aware of a holding by a judge of a state appellate court that addresses the same issue, and is coincidentally involved the operation of a 9-1-1 system. That case, ***Toles v. Regional Emergency Dispatch Center*** (5th App. Dist. 2003), 2003 Ohio 1190, 2003 Ohio App. Lexis 1131, made scant mention of the ***Hubbard*** decision: it failed to state the pertinent holding of that case, and then proceeded to completely misapply it.

The ***Toles*** court stated

> The Ohio Supreme Court in partially reversing ***Hubbard v. Canton City School Board of Education*** (2002), 97 Ohio St. 3d 451, 2002 Ohio 6718, 780 N.E. 2d 543 determined that the language of R.C. 2744.02(B)(4) referencing negligence of employees of a political subdivision occurring on the grounds of buildings being utilized for a governmental function negated immunity was not limited to injury resulting from physical defects or use of such grounds or buildings.

That much is true: the Supreme Court did hold that the exception regarding injuries resulting from negligence of governmental employees was not limited to physical defects or negligent use of the grounds or buildings. However, that does not automatically mean, as the judge in ***Toles*** concluded, that on this basis alone the immunity exception applies. As the Supreme Court (and the very wording of the statute itself) make clear, as noted above, the injury itself must occur on the grounds of those buildings. The terse reference to ***Hubbard*** in ***Toles*** utterly fails to take this into account.

It must also be noted that the opinion of the court is the opinion of only one judge there. Judge Hoffman concurred in the judgment only, and Judge Edwards dissented. Thus, the opinion is solely the opinion of Judge Boggins, and cannot be considered precedent even within the Fifth District[18].

However, even if this Court should reject the plain wording of R.C. 2744.02(B)(4) and the express holding of the ***Hubbard*** case, the County Defendants are still immune from liability.

R.C. 4931.49 grants immunity for the State of Ohio and those persons and political subdivisions engaged in the operation of a 9-1-1 system. Subsection (B) reads as follows:

> Except as otherwise provided in sections 701.02 and 4765.49 of the Revised Code, an individual who gives emergency instructions through a 9-1-1 system established under sections 4931.40 to 4931.51 of the Revised Code, and the principals for whom the person acts, including both employers and independent

[18] On the federal level, when a fragmented United States Supreme Court decides a case and "no single rationale explaining the result enjoys the assent of five Justices * * *, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." ***Marks v. United States*** (1977), 430 U.S. 188, 193. There is no reason not to apply the same standard here.

> contractors, public and private, and an individual who follows emergency instructions and the principals for whom that person acts, including both employers and independent contractors, public and private, are not liable in damages in a civil action for injuries, death, or loss to persons or property arising from the issuance or following of emergency instructions, except where the issuance or following of the instructions constitutes willful or wanton misconduct.

With the exception of the ***Toles*** opinion, ***supra***, there is a complete absence of case law regarding this statute. Judge Boggins' opinion quoted this statute, but held that there was a jury question regarding the existence of "willful or wanton misconduct" insofar as the dispatcher in ***Toles*** did worse than nothing: the dispatcher took the call, said she would tell the officers of what was dispatched, and then did not call any officers at all. Since the opinion noted that "willful or wanton misconduct" involved a failure to exercise any care whatsoever, the court reversed the trial court, and remanded for a trial, because Judge Boggins stated that it was a jury question as to whether, under the facts of not doing anything after stating one would do something, willful or wanton misconduct existed.

Even under that opinion, it is evident that there are major differences between the ***Toles*** case and the instant case. As has been noted, the County Defendants not only took the calls, and responded to them, but also dispatched a cruiser to the scene. The cruiser arrived while the decedent, Deborah Kirk, was still alive. Willful and wanton conduct was discussed and defined in ***Gladon v. Greater Cleveland Regional Transit Authority***, 75 Ohio St. 3d 312 (1996):

> RTA owed Gladon no duty except to avoid injuring him by willful or wanton conduct prior to discovering Gladon on the tracks. See ***McKinney***[19], 31 Ohio St. 3d at 246, 31 Ohio B. Rep. At 450-451,

[19] **McKinney v. Hartz & Restle Realtors, Inc**., 31 Ohio St. 3d 244 (1987).

> 510 N.E. 2d at 388. Willful conduct "'involves an intent, purpose or design to injure.'" Id. at 246, 31 Ohio B. Rep. At 452, 510 N.E.2d at 388-389, quoting ***Denzer v. Terpstra*** (1934), 129 Ohio St. 1, 1 Ohio Op 303, 193 N.E. 647, paragraph two of the syllabus. Wanton conduct involves the failure to exercise "'any care whatsoever toward those to whom he owes a duty of care, and his failure occurs under the circumstances in which there is great probability that harm will result.'" Id. at 246, 31 Ohio B. Rep. at 451, 510 N.E.2d at 389, quoting ***Hawkins v. Ivy*** (1977), 50 Ohio St. 2d 114, 4 Ohio Op. 3d 243, 363 N.E. 2d 367, syllabus.

Id. at 319.

It is evident that as a matter of law, it cannot be said that the actions taken (or not taken) by the communications technicians and the dispatcher constitute willful or wanton conduct as the Ohio Supreme Court has interpreted that phrase. It is an absurdity, based on this record, to conclude that there was a failure to exercise "any care whatsoever"; further, there is no evidence that there was any intent, purpose or design to injure. Were the record replete with a landscape littered with corpses and wounded people, or were the record replete with evidence of complete apathy towards the callers, there would be a different story here. But the system took thousands of calls per day without any such thing happening. (Depo. Swanson 34 (she took "hundreds" of calls daily herself). Indeed, to cite one example, Communications Technician Susi was the recipient of several letters of commendation for his abilities. (Depo. Susi, 109-114.)

Therefore, the County Defendants respectfully submit that because they are immune based on R.C. 4931.49(B), and because they are immune based on R.C. 2744.02(B)(4), there can be no liability on this state law claim as a matter of law, and this claim should be dismissed.

VI. CONCLUSION

Franklin County is not a legal entity and therefore not a proper party. Marino Susi and Earl Taylor are sued only in their official capacities and therefore are not proper parties. The Franklin County Board of Commissioners does not have oversight or control over the operation of the Franklin County 911 Communications Center and therefore should be dismissed from this case.

Plaintiff cannot sustain her §1983 claims against the County Defendants. She cannot demonstrate the a policy or custom of the County Defendants caused a deprivation of Kirk's constitutional rights. Even if she could demonstrate one incident of seemingly unconstitutional activity, one incident is not enough to impose liability.

Furthermore, Plaintiff cannot establish that any of Kirk's constitutional rights were violated. Her equal protection claim fails because she cannot demonstrate that similarly situated people were treated any differently from Kirk. Further, she cannot demonstrate that any policy or custom of the County Defendants was implemented with a discriminatory purpose. Plaintiff's due process claim fails as she cannot demonstrate that Kirk had a constitutional right to protection or that the actions of the County Defendants put her in a worse position that she was in before she called 911.

Finally, Plaintiff's state law tort claims fail pursuant to the immunity granted to the County Defendants in R.C. Chapter 2744, and in R.C. §4931.49.

For all the above reasons, Summary Judgment is appropriate for the County Defendants in this case, and this Court is respectfully asked to sustain this Motion.

Respectfully submitted,

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/s/ Patrick E. Sheeran

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I electronically filed the foregoing *County Defendants' Motion for Summary Judgment* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to Mr. Tony Merry, Counsel for Plaintiff, PALMER, VOLKEMA, THOMAS, 140 East Town Street, Suite 1100, Columbus, Ohio 43215, on this 14th day of April, 2004.

/s/ Tracie M. Boyd

Tracie M. Boyd
Assistant Prosecuting Attorney