

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KARIN KRISTENSEN, Individually §
And as Administratrix of the Estate of §
DAWN LARSON GIFFA; §
DONALD LARSON; and §
CIERRA LARSON, as Guardian and Next §
Friend of **K.L., a minor**; §

MICHAEL FARINA, Individually §
And as Personal Representative of the Estate of §
LYDIA FARINA, and as Next Friend of §
J.W.F, E.F, M.F. & K.F, all minor children; and §
BEVERLY MERRICK; §

CHRISTINA GUZMAN, Individually §
And as Personal Representative of the Estate of §
STEVEN GUZMAN, as Guardian and Next §
Friend of **M.G., a minor** and §
MARINA LYNN ELLIS, §

Plaintifs §

VS. §

THE UNITED STATES OF AMERICA §

Defendant §

CIVIL ACTION NO: 17-cv-126-LY

PLAINTIFFS' ORIGINAL COMPLAINT

COME NOW **KARIN KRISTENSEN**, Individually and as Administratrix of the Estate of **DAWN LARSON GIFFA**; **DONALD LARSON**; **CIERRA LARSON**, as Guardian and Next Friend of **K.L, a minor**; **MICHAEL FARINA**, Individually and as Personal Representative of the Estate of **LYDIA FARINA**, and as Next Friend of **J.W.F., E.F., M.F., AND K.F. all minor children**; **BEVERLY MERRICK**; **CHRISTINA GUZMAN**, Individually and as Personal Representative of the Estate of **STEVEN GUZMAN** and as Guardian and Next Friend of **M.F, a minor**, and

MARINA LYNN ELLIS, Plaintiffs and for causes of action against Defendant, THE UNITED STATES OF AMERICA, would show the Court as follows:

JURISDICTION, VENUE & SERVICE OF SUMMONS

1. This action is brought pursuant to the *Federal Tort Claims Act (FTCA)*, *28 U.S.C. §1346(b)(1) and 28 U.S.C. §2671, et seq.*, against the United States of America, Department of the Army, which vests exclusive subject matter jurisdiction of Federal Tort Claims litigation in the Federal District Court. The claims herein are brought against the Defendant for money damages as compensation for personal injuries and wrongful death caused by the Defendant's negligence.

2. Venue is proper in the Western District of Texas, pursuant to *28 U.S.C. §1402(b)* because the United States is a Defendant, and a substantial part of the events and omissions giving rise to this claim occurred in the Western District of Texas.

3. Service of summons may be had on the Defendant Pursuant to Rule *4(i) of the Federal Rules of Civil Procedure* and *Army Regulation 27-40* (governing service on the Department of the Army) by: (a) delivery of a copy of the summons and complaint by certified mail to the civil-process clerk at the office of the United States Attorney for the Western District of Texas at 601 NW Loop 410, Suite 600, San Antonio Texas 78216; and (b) delivery of a copy of the summons and complaint by certified mail to the Attorney General of the United States, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530-0001 and (c) delivery of a copy of the summons and complaint by certified mail to the Chief, Litigation Division, U.S. Army Legal Services Agency, 9275 Gunston Road, Fort Belvoir, Virginia 22060-5546.

4. Pursuant to *28 U.S.C. §2675*, this claim was presented by the filing of an Administrative Claim with demand for monetary damages, on behalf of all Plaintiffs, with the

appropriate agency of Defendant, the United States of America, namely the Department of the Army, U.S. Army Claims Service, which was received by such agency by email on August 18, 2016 and by certified mail, return receipt, on August 19, 2016. Six months having elapsed, the United States and Army have not either settled or come to a final conclusion denying liability, therefore all conditions precedent to a Federal Tort Claims Act action have now been met.

PARTIES

5. Plaintiffs KARIN KRISTENSEN, Individually and as Administratrix of the Estate of DAWN LARSON GIFFA, DONALD LARSON and CIERRA LARSON, as Guardian and Next Friend of K.L., a minor, are residents of Kingston, Ontario, Canada. Karin Kristensen is the mother of Dawn Larson Giffa, deceased. Donald Larson is the father of Dawn Larson Giffa, deceased. Cierra Larson is the sister of Dawn Larson Giffa, and guardian of K.L., a minor, who is the son of Dawn Larson Giffa, deceased.

6. Plaintiffs MICHAEL FARINA, Individually and as Personal Representative of the Estate of LYDIA FARINA and as Next Friend of J.W.F., E.F., M.F. & K.F., all minor children; and BEVERLY MERRICK are residents of Killeen, Bell County, Texas. Michael Farina is the husband of Lydia Farina, deceased. J.W.F., E.F., M.F. AND K.F., are minors and the children of Lydia Farina, deceased, and Michael Farina, who is their guardian. BEVERLY MERRICK is the mother of Lydia Farina, deceased.

7. Plaintiffs CHRISTINA "TINA" GUZMAN, Individually and as Personal Representative of the Estate of LARRY STEVEN GUZMAN, hereinafter "Steven Guzman" and Guardian and Next Friend of M.F., a minor, and MARINA LYNN ELLIS, are residents of Killeen, Bell County, Texas. Christina Guzman is the wife of Steven Guzman, deceased. MARINA LYNN

ELLIS and M.F. are the children of LARRY STEVEN GUZMAN. CHRISTINA GUZMAN is the aunt of Lydia Farina, deceased.

8. At all relevant times, the Defendant UNITED STATES OF AMERICA, acted through its agency DEPARTMENT OF THE ARMY.

**STATUTORY BASIS OF LIABILITY AGAINST
THE UNITED STATES OF AMERICA**

9. This case is brought against the United States of America pursuant to *28 U.S.C. §2671 et seq.*, commonly referred to as the “Federal Tort Claims Act” or FTCA. Liability of the United States is predicated specifically on *28 U.S.C. §§1346(b)(1) and 2674* because the personal injuries, wrongful deaths and resulting damages that form the basis of this Complaint, were proximately caused by the negligence, wrongful acts and/or omissions of employees of the United States of America through its agency, DEPARTMENT OF THE ARMY. These employees were acting within the course and scope of their office or employment, under circumstances where the UNITED STATES OF AMERICA, if it were a private person, would be liable to the Plaintiffs in the same manner and to the same extent as a private individual under the laws of the State of Texas. Federal Tort Claims Act claims may be brought against the UNITED STATES OF AMERICA through the DEPARTMENT OF THE ARMY for injuries and death of civilians due to the actions of soldiers, under facts such as these where the Army’s negligence, including the negligent undertaking of a duty to protect a battered spouse or abused child from an abusing serviceman, and failure to follow its own regulations for the protection of the battered spouse or abused child, caused injury or death at the hands of the service member. *See, e.g., Tarisha Williams, individually and as the Personal Representative of the Estate of Talia Williams, a Deceased Minor v. United States of America*, No. 1:08-cv-437-ACK-BMK, Summary Judgment Ruling, Dkt. 63, 2010, In the United States District Court for the District of Hawaii.

STATEMENT OF FACTS

10. In February of 2015, Specialist (SPC) Atase Giffa was a soldier stationed at Fort Hood, Texas. He lived off-base at 1710 Godman Street, Killeen, Texas with his wife, Dawn Larson Giffa and her son K.L. SPC Giffa's mother also lived at this residence. Dawn Giffa and her son K.L. were Canadian citizens and Lawful Permanent Residents of the United States. Dawn had almost completed nursing school and was looking forward to starting her nursing career. SPC Giffa was about to be transferred to Georgia, and he expected Dawn and K.L. to accompany him. Dawn, however, wanted to stay in Killeen long enough to finish her nursing education. SPC Giffa took this news poorly.

11. The Farina and Guzman Plaintiffs are close relatives. They live next to each other on the same street and regularly spent time together. The Farina Plaintiffs lived at 1706 Godman Street, Killeen, Texas and the Guzman Plaintiffs resided at 1709 Godman Street, Killeen, Texas, across the street from the Giffas. Dawn Giffa was a neighbor of and friends with the Farinas and Guzmans and regularly spent time at their homes.

12. On or about the evening of February 9, 2015, SPC Giffa, while at his off-base residence, took Dawn's and K.L.'s passports and Permanent Resident identification cards and Dawn's credit cards and money and would not let Dawn have access to them. During an argument outside their home, some of the neighbors saw SPC Giffa slam Dawn against their truck and hold her down by the wrists. The neighbors called the Killeen Police Department ("KPD"). The neighbors also witnessed red marks on Dawn where SPC Giffa had grabbed her, thrown her, and restrained her.

13. When the Killeen Police Department officers arrived and determined that SPC Giffa was a soldier assigned to an Army unit at Fort Hood, they declined to arrest him by virtue of

his military status. Instead, the civilian police officers told Dawn Giffa to call the military police at Fort Hood and SPC Giffa's military Commander.

14. Army Regulation (AR) 608-18 sets out the Army's policy on "the prevention, identification, reporting, investigation, and treatment of spouse and child abuse." AR 608-18, ¶ 1-1 ("Purpose."). Army policy, as per this regulation, is "to prevent spouse and child abuse, to protect those who are victims of abuse, to treat those affected by abuse, and to ensure personnel are professionally trained to intervene in abuse cases." *Id.* at ¶ 1-5 ("Policy"). Further, Army policy recognizes that "[s]ince many incidents of abuse constitute violations of the law," a military commander possesses the "authority to take disciplinary or administrative action..." *Id.*

15. Pursuant to AR 608-18, each Army base is required to create and enter into a Memorandum of Agreement (MOA¹) with willing adjoining jurisdictions to delineate the responsibilities of and interactions between the military (including military police) and local authorities. *Id.* at ¶ 2-12 ("Memorandum of Agreement"). Further, pursuant to DoDI § 6400.01, the Army is required to develop "local memorandums of understanding with civilian authorities for reporting cases [of domestic abuse], providing services, and defining responsibilities when responding to child abuse and domestic abuse." Similarly, in accordance with AR 190-45 ("Law Enforcement Reporting"), Fort Hood command, law enforcement, and prosecutorial officials are required to "establish formal memorandums of understanding (MOUs) with their civilian counterparts to establish or improve the flow of information between their agencies, especially in instances involving military personnel." AR 190-45, ¶ 4-12.a. It is not discretionary whether the base will enter into an MOA with adjoining jurisdictions. In fact, in cases where civilian State

¹ These are also known at times as Memorandum of Understanding (MOU), with the nomenclature changing depending on the specific regulations, though both MOA and MOU are used for the same types of documents. Where in this Complaint the term MOA or MOU is used, it should be considered interchangeable.

agencies refuse to enter into an MOA, the installation manager for the Army Family Advocacy Program must notify the Assistant Chief of Staff of the Army for Installation Management. *Id.*

16. Both the City of Killeen, Texas, which adjoins the Fort Hood military installation, and the DEPARTMENT OF THE ARMY have told Plaintiffs that no such MOA exists between them. Federal law recognizes that civilian law enforcement authorities are normally responsible for investigating actual or suspected criminal activity by service members that occurs outside of a military installation. *See e.g.*, 32 C.F.R. § 637.5. However, during the decades that Fort Hood has been in existence, as the largest Army base in the world, a practice has developed that when soldiers are involved in criminal behavior outside of the installation that would otherwise come under the jurisdiction of civilian police and courts, military authorities will assume responsibility for the investigation and ultimate disposition of the matter. Civilian authorities will defer to the soldiers' military commanders, their senior enlisted advisers, and the military police and judicial systems. Here, SPC Giffa was a soldier who assaulted his wife off-base and stole her money and identification. Neighbors called KPD, the civilian authorities. When the KPD learned that SPC Giffa was a soldier stationed at Fort Hood and his wife was the victim, KPD declined to arrest SPC Giffa and told Dawn to call the military police and her husband's Commander, who would handle the situation. Dawn Larson Giffa did call the military police and SPC Giffa's Commander, who, as shown below, took jurisdiction for the matter and then proceeded negligently.

17. The KPD left the Giffa residence. Dawn and her son went immediately across the street to the home of Michael and Lydia Farina seeking safety. They remained at the Farina home throughout the events that follow. The KPD officers represented to Dawn Larson Giffa that the matter would be reported to commanders at Fort Hood and would be handled by them.

18. The next morning, February 10, 2015, while she was in the Farina home and in the presence and hearing of Michael and Lydia Farina, Dawn placed a telephone call to her husband's Commander at Fort Hood. She told the Commander that the KPD had to be called to her residence because her husband, SPC Giffa, put his hands on her and slammed her against her truck. Dawn told the Commander that the KPD Officers were going to report this incident to the Army. After completing her call with the Commander, Dawn told Michael and Lydia Farina that Army personnel were going to come and get her husband and put him on a 48-hour watch, place him in the barracks at Fort Hood for seven days and issue a 500-foot restraining order – or “no-contact order” in military terms – preventing SPC Giffa from coming within 500 feet of Dawn or her son or their residence. The Army Commander told Dawn these things, thereby taking on a duty to perform these actions in a non-negligent manner. Later that afternoon, the Army manifested their undertaking with action: two representatives from the military police at Fort Hood arrived at the Giffa residence and took SPC Giffa away in handcuffs.

19. On the afternoon of February 11, 2015, SPC Giffa returned to his residence escorted by two men dressed in military battle dress uniforms. SPC Giffa was allowed to get into his own vehicle and drive away with the military-dressed men following him.

20. On the morning of February 12, 2015, Dawn again placed a call to SPC Giffa's Commander, within the hearing and in the presence of Michael Farina, and was told for the second time that her husband had been put on a 48-hour watch, was going to be kept in the barracks for 7 days, and that the Army had imposed a 500-foot restraining or “no-contact” order against him with respect to the Giffa residence, Dawn and K.L. Also during this conversation, Dawn told the Commander that her husband had taken her driver's license, her credit cards, her and her son's Permanent Resident identification cards (“Green Cards”), and other important documents and that

she needed these items returned. In another phone call, the Commander reported to Dawn that her husband did not have these documents with him in the barracks. Later that afternoon, two military personnel in battle-dress uniforms came to the Giffa residence and met with Dawn. They were unable to find her documents and papers inside the Giffa residence. The Army refused to search SPC Giffa's vehicle, after Dawn gave them permission to do so. At that time, SPC Giffa's Commander told Dawn that SPC Giffa had 48 hours to return her documents or the Army was going to arrest him. Later that same day, February 12, 2015, at approximately 4:00 or 5:00 p.m., the same two military personnel returned to the Giffa residence with SPC Giffa and allowed him to go into his residence by himself. When SPC Giffa came out of the residence, he was again escorted away by the military personnel. Dawn did not receive her documents.

21. On the morning of February 13, 2015, Dawn received a phone call from SPC Giffa's Commander and was told that her identification and documents were on the kitchen island in her house. That afternoon, Michael Farina and Dawn Larson Giffa observed that military personnel returned to the Giffa residence with SPC Giffa to again look for her documents. One of the military men entered the house. The other military man stayed outside with SPC Giffa. Michael Farina personally spoke to one of these men to stress the importance of Dawn recovering her property. Michael Farina was told to "step back" and that "we're taking care of this" by the Army personnel.

22. On February 14, 2015, between 8 am and 10 am, on two occasions, Dawn Larson Giffa and Lydia and Michael Farina observed SPC Giffa driving less than 500 feet from their residence on Lake Road, in violation of the no-contact order. In the presence of Michael and Lydia Farina, Dawn made a phone call to Giffa's Commander and reported this violation. After this phone call, Dawn told Michael and Lydia Farina that the Commander was going to contact her

husband and bring him in and find out why he had driven near their residence. Apparently nothing of consequence was done about these violations of the no-contact order.

23. On February 15, 2015, Michael Farina again observed SPC Giffa driving in a location less than 500 feet from the Giffa residence and the locations of Dawn Giffa and K.L. Nothing was apparently done about this violation of the no-contact order. Violations of the no-contact order should have been put in the National Crime Information Center (“NCIC”) database to have been shared with the Killeen Police Department, among other police and law enforcement agencies, and would have shown up in a NICS background search when SPC Giffa purchased his handgun at the pawn shop and ammunition at Wal-Mart.

24. On February 16 or 17, 2015, SPC Giffa’s Commander called and asked Dawn to come to Fort Hood to meet for a family counseling session. Based on the Army’s heavily redacted murder investigation report on the crimes at issue here, SPC Giffa had been placed into an anger management course during this week. At the family counseling session, Dawn met with SPC Giffa and an Army Counselor. Following this meeting, Dawn returned to the Farina home and wept for hours. Dawn reported to Michael and Lydia Farina and others that she was told that SPC Giffa was going to be released the following Wednesday. In response to this statement, Dawn said that she told the Army counselor: “if you release him, he will kill me.” Dawn expressed the belief that no one at Fort Hood was doing anything to help her situation and that she was in fear for her life in spite of the fact that she was going through all the steps that the Army required.

25. At no time during the week after Dawn reported domestic violence against her did the Army notify Dawn Larson Giffa that she was could qualify for financial and logistical support from the Army in relocating to temporary housing away from her abuser. At no time did the Army offer to move Dawn Larson Giffa and K.L. to a hotel or motel in the area, away from SPC Giffa,

to put space between Dawn Larson Giffa and SPC Giffa, and keep her location secret from him. This financial and logistical support is required to be offered by the Army in domestic violence cases. It would have moved Dawn Larson Giffa away from her abuser and would have also moved her away from the Farina and Guzman household. During this time, Dawn and K.L. were living with the Farinas, next door to the Farina's relatives, the Guzmans, who were all protecting Dawn. This was directly across the street from the Giffa home, and at a place where SPC Giffa knew where Dawn was and knew who was providing her shelter.

26. At no time did the Army enter SPC Giffa having either a no-contact order, or violating the no-contact order, into the NCIC Criminal Record system. This would have prevented SPC Giffa from obtaining a gun by notifying pawn shops, gun shops and sporting goods shops in Killeen, Belton and Temple, that SPC Giffa had a no-contact order put in place and had violated it. Further, under the Fort Hood Commanding General's Policy Letter #3, ¶3.d, the Army was required to determine if SPC Giffa was at risk of suicide or causing harm to others. Under the policy letter, the Commander was required to ask the soldier if he or she possessed any firearms or intended to procure any firearms. The Army did not do so.

27. On February 18, 2015, SPC Giffa was released from Fort Hood. Instead of returning to her home, Dawn and her son remained with the Farina family which was her only option to look out for her own safety and that of her son.

28. On Sunday, February 22, 2015, SPC Giffa went across the street to the Farina home and asked Dawn to come back to their home. Dawn declined to do so, stating that she needed some space and time (space and time she would have been afforded had the Army followed its regulations and given her financial assistance and living assistance by putting her and K.L. in a hotel/motel in Temple or some other nearby town). SPC Giffa left, went home, and retrieved a

gun that he had recently purchased at a pawn shop in Temple, Texas and ammunition he had recently purchased from Wal-Mart. He returned to the Farina home and began a shooting rampage. Michael Farina first saw SPC Giffa with the gun and tried to draw fire away from his family. SPC Giffa shot at Michael Farina's head, only missing because Michael Farina slipped as SPC Giffa was pulling the trigger. SPC Giffa then chased Michael Farina outside, shooting at Michael Farina repeatedly.

29. SPC Giffa then returned to the Farina house and encountered Lydia Farina and shot her in the head, killing her in her home and covering Dawn's son, K.L. with blood. SPC Giffa then found Dawn and took her outside on the lawn and beat her mercilessly. Dawn was screaming and begging for him to stop. Steven and Tina Guzman heard the beating and came outside to try to save Dawn. SPC Giffa saw them and fled. Steven Guzman picked up Dawn and carried her back into the Farina home. Tina Guzman went to get the four Farina children and K.L., but then she saw someone laying in the garage. She went into the garage and found Lydia Farina, her niece, shot dead. Then SPC Giffa returned. Tina Guzman begged him. SPC Giffa shot Tina through the face and in the neck. The bullets went through her face, her teeth and jaw, causing extensive damage and trauma. Steven watched his wife being shot.

30. Tina Guzman was terrified for her husband, Steven, but tried to walk home while bleeding profusely, to stop her daughters from coming out and also being shot. SPC Giffa went into the Farina house to murder Steven. SPC Giffa shot Steven once in the body and once in the side of his head, but Steven did not die right away and still had a pulse when the EMTs later arrived. The two Farina sons, J.W. (age 4) and M.F. (age 8), saw SPC Giffa shoot Steven Guzman, after having killed their mother Lydia. They also saw Dawn Giffa in her beaten condition. Immediately after Steven was shot, the boys J.W.F, M.F. and K.L., went to hide in a bedroom with

the Farina daughters, E.F. (age 6) and K.F. (age 9). The youngest boy, J.W.F, then fled the home and was found and rescued by his father, Michael Farina.

31. SPC Giffa then dragged Dawn from the Farina lawn, across the street into the Giffa home. The Killeen Police had been called by someone and alerted to SPC Giffa's rampage. The KPD SWAT team arrived and eventually entered the Giffa home where they found Dawn tortured to death by three shots to her torso, one in each arm, and a fatal gunshot to the head. They found SPC Giffa dead from a self-inflicted gunshot wound. Two of the young sons of Lydia and Michael Farina were witnesses to the killing of their neighbor and relative, Steven Guzman. The minor child, K.L., saw the man he considered his father murder Lydia Farina and was covered in Lydia's blood. Immediately after the killings, K.L. was trembling and covered in blood, saying: "Daddy killed Lydia. Daddy tried to kill me. Daddy is going to kill Mommy".

32. All of the factual allegations herein that are attributed to Dawn Larson Giffa will be corroborated by competent witnesses and will be further corroborated by documents which, upon information and belief, are in the possession of the Defendant Department of the Army and/or the Killeen Police Department, which documents will be requested in discovery.

CAUSE OF ACTION: NEGLIGENCE AND NEGLIGENT UNDERTAKING
PURSUANT TO RESTATEMENT 2ND OF TORTS, §323

Law on FTCA, Negligence and Negligent Undertaking

33. The Federal Tort Claims Act, (FTCA), 28 U.S.C. §1346(b)(1) and 28 U.S.C. §2671, *et seq.* provides that:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

The FTCA has been applied to the actions and inactions of the United States Army in cases where injury and death occurred from spousal and/or child abuse by a soldier against a family member.

See *Tarisha Williams, individually and as the Personal Representative of the Estate of Talia Williams, a Deceased Minor v. United States of America*, No. 1:08-cv-437-ACK-BMK, Summary Judgment Ruling, Dkt. 63, 2010, In the United States District Court for the District of Hawaii. Further, the FTCA has been applied to United States government actors who negligently perform duties that no completely private party normally undertakes (like police powers). See *Indian Towing Co. v. United States* 350 U.S. 61, 69 (1955) (analogizing government conduct to private parties in a case involving a lighthouse, and finding liability); see also *Sheridan v. United States*, 487 U.S.92 (1988).

34. Under Texas state law, the elements of a cause of action for negligence are:
- a. The defendant owed a legal duty to the plaintiff
 - b. The defendant breached the duty
 - c. The breach proximately caused the plaintiff's injury

Nabors Drilling, USA, Inc. v. Escoto, 288 S.W.3d 401, 404 (Tex. 2009). Texas has adopted the Restatement (Second) of Torts, §323, Negligent Undertaking. The Texas Supreme Court, in *Torrington v. Stutzman*, 46 S.W.3d 829 (Tex. 2000), stated:

While Texas law imposes no general duty to "become [a] good Samaritan," we have recognized that a duty to use reasonable care may arise when a person undertakes to provide services to another, either gratuitously or for compensation. *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 396 (Tex. 1991); *Colonial Sav. Ass'n v. Taylor*, 544 S.W.2d 116, 120 (Tex. 1976); RESTATEMENT (SECOND) 838*838OF TORTS §§ 323, 324A (1965).

In *Colonial Savings*, 544 S.W.2d at 119-20, we relied upon section 323 of the *Restatement*, which provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 323 (1965).

35. The government's waiver of sovereign immunity in the FTCA is tempered by 28 USC §2680, and primarily part (a), stating the waiver does not apply to:

“any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”

However, the discretion at issue comes at the policy stage, not at the stage of implementation on the ground. In *Blessing v. United States*, 447 F. Supp. 1160, 1172 (E.D. Penn. 1978), a case involving a negligent undertaking claim in the context of the FTCA, there was an extensive discussion on the discretionary function exception. The court held that the discretion which keeps the United States from being liable occurs at the *policy stage*, not the operational stage. A plaintiff cannot sue the government for exercising its judgment in setting policies. However, if the individual actors are negligent in *carrying out policies* in a manner that deviates from the policy, and that causes harm, then there can be liability. In this case, there is no official Army policy of shielding domestic abusers, and no discretion to do so. Plaintiffs are not claiming that by setting out policies and procedures for handling domestic abuse cases that the specific policies and regulations create a duty on their own, and that deviation from those duties is negligence *per se*. Rather, Plaintiff is stating that once the Army undertook a duty to assist Dawn Larson Giffa, by taking effective jurisdiction for the actions of their soldier, SPC Giffa, the Army had a duty to carry out its undertaken duties in a non-negligent fashion. As shown above, the FTCA creates a cause of action for state law negligence claims, such as negligent undertaking claims. The regulations listed below and discussed herein, establish that the Army's personnel at issue, in negligently failing to follow specific non-discretionary regulations after their affirmative

undertaking of the duty to protect Dawn Larson Giffa from SPC Giffa, acted negligently toward Dawn Larson Giffa, and by extension of foreseeability, the Farina and Guzman plaintiffs, who were injured by the Army's negligent actions and omissions. The specific regulations of the United States, cited herein, evidence and establish the nature and extent of the duty that was voluntarily undertaken by the United States and negligently performed.

36. The Army's duty to Dawn Larson Giffa is established by its negligent undertaking of the duty to protect Dawn after her husband and soldier, SPC Giffa, attacked and battered her. The neighbors called the Killeen Police, and the Killeen Police turned the case over to the military. The military had a duty to implement its regulations which were created to assist battered spouses. The Army's duty extends to the other Plaintiffs as well. It was foreseeable that when Dawn was battered by SPC Giffa, Dawn would have to move somewhere else. In fact the military has myriad regulations for just this issue. Since the Army knew that Dawn had no identification, money or credit cards - and undertook to get them back, but didn't - and that she was from Canada, it was foreseeable that Dawn would move in with the neighbors; the Farina's. In this case, the Army had actual knowledge that Dawn was being sheltered by a neighboring family, and staying with the Farinas. SPC Giffa had already melted down once and battered Dawn, and had taken her IDs and money to prevent her from leaving. The Army put SPC Giffa on a no-contact order, then didn't enforce it. The Army apparently put SPC Giffa into anger management class for a week, which clearly didn't work. The Army had a family counseling session then, when Dawn Larson Giffa directly warned the Army counselor that SPC Giffa would try to kill her if he was released from Army custody, they let him go anyway without any apparent follow-up. The Army left Dawn at the Farina house and did not notify Dawn of available resources to move to a secure location, and did not notify her of available financial assistance resources. It left her across the street from her

abuser, in a location he was aware of; a location with a separate family with small children. The Army also failed to notify the national crime databases of the SPC Giffa's transgressions, which would have made it much more difficult - if not impossible - for him to buy a gun and ammunition. Therefore, the danger to the Farinas and the Guzmans (who are all one family that was sheltering Dawn when the Army failed to do so) was foreseeable. Specifically, it was foreseeable that SPC Giffa would harm and even kill not only Dawn Larson Giffa but members of the family that had taken her in and were sheltering her. Thus, the Army's duty to protect Dawn Larson Giffa from SPC Giffa extended to those in the family who were sheltering her, including Lydia Farina, Christina Guzman and Larry "Steven" Guzman, who were injured and/or killed in trying to protect Dawn Larson Giffa when SPC Giffa went on his rampage. The Army undertook a duty to protect Dawn Larson Giffa through its specifically enunciated domestic violence programs, and then negligently implemented those programs, negating to do myriad actions they were required to do.

Specific non-discretionary policies that the Army violated in this case

37. An array of Department of Defense and Department of the Army instructions, regulations and orders, and federal statutes and regulations, establishes numerous non-discretionary actions that Army officials were required to take in this case. Because these provisions mandate specific conduct, the discretionary function test does not apply. Excerpts of the key provisions, which applied and were violated, include:

Department of Defense Instruction 6400.06 – “Domestic Abuse Involving DoD Military and Certain Affiliated Personnel”:

- ¶ 6.1 “Commander’s Role in Responding to Domestic Abuse”
 - ¶ 6.1.1.2: This provision required military commanders across the entire Department of Defense to “ensure that victims are informed of available services.”

- ¶ 6.1.1.7: This provision required military commanders across the Department of Defense to “ensure that the victim... and family members of the victim who are eligible for treatment in a military medical facility... are aware of appropriate medical, mental health and other assessments, treatment, and referrals...”
- ¶ 6.1.1.9: This provision required military commanders across the Department of Defense to “[e]nsure safe housing has been secured for the victim...”
- ¶ 6.1.1.12: This provision required military commanders across the Department of Defense to “[p]rovide the victim with information about the Family Advocacy Program (FAP), victim advocate services, (and) legal services...”
- ¶ 6.1.1.13: This provision required military commanders across the Department of Defense to “[e]nsure that victim advocacy is provided within a coordinated community response.”
- ¶ 6.1.1.13: This provision required military commanders across the Department of Defense to “[e]nsure that victims of domestic abuse, living on or off the installation, have access to victim advocacy services... 24 hours a day through either personal or telephonic contact; that such services include both immediate and ongoing information and referral assistance; safety planning and support services; that victims shall be actively involved in all aspects of their safety and service plans; and that victims can make decisions regarding their safety and welfare...”
- ¶ 6.1.1.15: This provision required military commanders across the Department of Defense to, in consultation with FAP staff, “ensure a safety plan is prepared and in place, and monitor the victim’s safety.”
- ¶ 6.1.1.16: This provision required military commanders across the Department of Defense to “[r]eview each law enforcement investigative report with the servicing legal office to determine appropriate disposition.”
- ¶ 6.1.1.18: This provision required military commanders across the Department of Defense to consult FAP staff to determine SPC Giffa’s “level of danger to the victim and others.”
- ¶ 6.1.1.22: This provision required military commanders across the Department of Defense to “[e]nsure protection of all persons alleged or known to be at risk from domestic abuse by issuing and enforcing an appropriate military protective order (MPO) that is coordinated with those civilian authorities that enforce the protective orders issued by civilian courts.”
- ¶ 6.1.2.1: This provision required military commanders across the Department of Defense to “issue and monitor compliance with an MPO when necessary to

safeguard a victim, quell a disturbance, and maintain good order and discipline...”

- ¶ 6.1.2.4: This provision required military commanders across the Department of Defense to “tailor the terms of the MPO to meet the specific needs of an individual victim.”
- ¶ 6.1.5: This provision required military commanders across the Department of Defense to “ensure military criminal investigative and law enforcement organizations and legal officials establish formal memorandums of understanding (MOUs)... for improving information sharing on domestic abuse investigations, arrests, and prosecutions involving military personnel.”
- ¶ 6.2.6: This provision required military law enforcement personnel to “immediately notify FAP of the (domestic abuse) incident to prompt a thorough risk assessment and safety planning.”
- ¶ 6.4.2.7: This provision required military victim advocates to discuss with Dawn Giffa “an initial safety plan and, with the active participation of the victim, develop a plan in accordance with DD Form 2893, “Victim Advocate Safety Plan.”
- ¶ 6.4.2.8: This provision required military victim advocates to ensure that Dawn Giffa was “aware of the legal actions available to promote (her) safety.”
- ¶ 6.4.2.9: This provision required military victim advocates to offer Dawn Giffa “information... regarding local resources for immediate and long-term protection and support; workplace safety; housing; childcare; legal services; clinical resources; medical services; chaplain resources... and other military and civilian support services.”
- ¶ 6.4.2.10: This provision required military victim advocates to facilitate for Dawn Giffa “contact with military and civilian resources... including shelter and safe housing resources.”
- ¶ 6.4.3.1: This provision required military victim advocates to “[e]nsure that the FAP, law enforcement, and the command were aware of (Dawn Giffa’s) safety plan...”
- ¶ 6.4.3.3: This provision required military victim advocates to develop a safety plan with Dawn Giffa.
- ¶ 6.4.3.7: This provision required military victim advocates to provide Dawn Giffa with “comprehensive information and referral on relevant local military and civilian resources, the National Domestic Violence Hotline... and Military OneSource.”

- ¶ 6.4.3.8: This provision required military victim advocates to assist Dawn Giffa in “gaining access to service providers and victim support resource that can help (her) explore future options and prioritize action.”
- ¶ 6.4.3.9: This provision required military victim advocates to assist Dawn Giffa in “contacting appropriate military and civilian legal offices for personal legal advice and assistance specific to (her) circumstances or case...”
- ¶ 6.4.5.4: This provision required military victim advocates to “[c]ollaborate with military and civilian law enforcement and criminal investigative units in the establishment of protocol and procedures to ensure: (1) notification of the victim advocate when such units are notified of domestic abuse; (2) collaboration on safety planning and safety measures; and (3) ongoing training of military and civilian law enforcement personnel on the victim advocate’s role.
- ¶ 6.4.5.7: This provision required military victim advocates to “[e]stablish liaison with civilian victim resources.”
- ¶ 6.6.2: This provision required FAP personnel, such as military victim advocates, to conduct a risk assessment including, among other things:
 - The abuser’s access to the victim;
 - The abuser’s past use of a weapon, threats to use a weapon, or access to a weapon that may be used against the victim;
 - History of law enforcement involvement regarding domestic abuse;
 - The existence of a restraining or protection order;
 - The violation of a protection order by the abuser;
 - The victim’s living situation;
 - The abuser’s conduct exhibiting obsessive behavior, extreme jealousy, rage, agitation, or instability; and,
 - The abuser’s isolation of the victim.

10 U.S.C. § 1567a – “Mandatory Notification of Issuance of Military Protective Order to Civilian Law Enforcement”

- This provision required the Fort Hood commander to notify civilian law enforcement authorities that a military protective order had been put in place protecting Dawn Giffa from SPC Giffa, of any changes to the protective order, and of the termination of the protective order.

32 C.F.R. § 635 – “Offense Reporting in Law Enforcement and Criminal Investigations in the Department of the Army”

- 32 C.F.R. § 635.19: This provision required Fort Hood law enforcement authorities – specifically, the Provost Marshall’s Office and/or the Department of Emergency Services

– to notify local civilian law enforcement and judicial authorities of the issuance of the protective order protecting Dawn Giffa from SPC Giffa and of the termination of the protective order.

Army Regulation 608-18 – “The Army Family Advocacy Program”²:

- ¶ 2-15: This provision required the Fort Hood Family Advocacy Program Manager to develop a MOA between military and civilian agencies on Fort Hood involved in the Family Advocacy Program to delineate local policies, responsibilities, and functions according to the regulation. At a minimum, this MOA was required to address:
 - Prevention and identification of spousal abuse;
 - Reporting and notification procedures;
 - Crisis intervention;
 - Intake procedures;
 - Assessment and investigation;
 - Case management;
 - Treatment and support services;
 - Records management;
 - Out-of-home assessments and investigations;
 - Quality assurance;
 - Program evaluations;
 - Notification and involvement of commanders;
 - Liaison with local courts and agencies;
 - Threat-to-life transfers; and,
 - Training.
- Section 3-2 “Required Prevention Programs”
 - ¶ 3-2.h.: This provision mandated a victim advocacy services program providing “comprehensive assistance and support to victims of spouse abuse, including crisis intervention, assistance in securing medical treatment for injuries, information on legal rights and proceedings, and referral to military and civilian shelters and other resources available to victims.” Among the victim advocates’ responsibilities was the obligation to “review the victim safety plan and ensure that the plan is updated as necessary.”
- Section 3-4 “Army Reporting Requirement in Abuse Cases”
 - ¶ 3-4.b.: This provision required “[a]ll installation law enforcement personnel, physicians, nurses, social workers, school personnel, FAP and CYS personnel, psychologists, and other medical personnel” to “report information about known

² See also Department of Defense Instruction 6400.01, “Family Advocacy Program,” stating that “[i]t is DoD policy to... [p]romote early identification; reporting options; and coordinated, comprehensive intervention, assessment, and support to... victims of domestic abuse,” and setting out responsibilities and procedures for the Family Advocacy Program.

or suspected cases of... spouse abuse to the RPOC (report point of contact) or appropriate military law enforcement agency...”

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- ¶ 3-4.c.: This provision required commanders to “report allegations of abuse involving their soldiers to the RPOC.”
- Section 3-15 “Interviewing the Victim of Abuse,” ¶ 3-15.b.: This provision mandated “coordinated joint interviews by law enforcement and medical and social work personnel whenever possible” and states that “[v]ictims should be interviewed separately outside the presence of the offender.”
- Section 3-21 “Protection of Abused Spouses and Children.”
 - ¶ 3-21.a.: This provision required the military police to interview both SPC Giffa and Dawn Giffa “separately so that each spouse can speak freely without being inhibited by the presence of the other.”
 - ¶ 3-21.b.: This provision required the military police to inform Dawn Giffa about the Army’s Family Advocacy Program – that is, the Army’s comprehensive program on domestic violence prevention, identification, and response – and about “a shelter or other available victim assistance services.” Furthermore, this provision required the military police to “arrange or provide transportation for the victim to a shelter, [military treatment facility], or other appropriate victim assistance agency.”
 - ¶ 3-21.d.(3)(a): This provision required SPC Giffa’s Commander to provide Dawn Giffa with “a written copy within 24 hours of its issuance...” of the no-contact order imposed on SPC Giffa.
- Appendix B “Family Advocacy Program Standards,” ¶ B-3.h.: This provision required a “clinically privileged professional” to conduct an assessment including, at a minimum the following matters:
 - Background checks of previous abuse incidents;
 - Reports of any law enforcement investigations;
 - Information obtained from collateral contacts (e.g., schools, on-base agencies, etc.);
 - Interviews with SPC Giffa, Dawn Giffa, and other members of their household;
 - Assessment of the presenting problem;
 - Assessment of the functioning of SPC Giffa, Dawn Giffa, and other members of their household;
 - Assessment of the medical findings and history of SPC Giffa, Dawn Giffa, and other members of their household;
 - Assessment of the severity of the abuse and previous abuse incidents;
 - Assessment of the risk for future abuse;
 - Assessment of the need for protection of the victim, i.e., Dawn Giffa’s protection;

- Assessment of the necessary clinical, educational, and support services;
 - History of physical abuse;
 - History of substance abuse;
 - History of mental health treatment;
 - History of criminal activity;
 - Identification of weapons in the home;
 - Current family stressors; and,
 - History of medical illness.
- Appendix C “Guidelines,” ¶ C-9: This provision required, within 24 hours, 72 hours, and 7 days, respectively, of receiving a report of spousal abuse, the following actions:
- Within 24 hours:
 - An evaluation of Dawn Giffa by a Fort Hood social worker using the spouse abuse assessment guidelines in the applicable Spouse Abuse Manual;
 - The documentation by the social worker of referrals to shelters, safety issues with the victim, and a safety plan for children.
 - A medical examination of Dawn Giffa by a physician.
 - A review by a physician of Dawn Giffa’s medical records for prior incidents of spouse abuse;
 - Notification to SPC Giffa’s commander or senior enlisted advisor by the social worker of the protection plan, and, if available, any information regarding the possession of weapons;
 - Follow-up by the social worker with SPC Giffa’s chain of command to ensure compliance with the protection plan.
 - Within 72 hours:
 - An assessment by the social worker of the potential for future injury to Dawn Giffa using specified guidelines;
 - Notification by the social worker to Dawn Giffa of the resources available to her including, for example, the location of shelters, the availability of legal services, and the availability of victim advocates.
 - A query of the Army Central Registry by the social worker for prior substantiated cases of domestic abuse by SPC Giffa.
 - Within 7 days:

A query by the social worker of every collateral organization involved in the case, including the military police, to obtain any pertinent information and documentation.

AR 190-45 – “Law Enforcement Reporting”:

- ¶ 4-12.a.: This provision required Fort Hood military officials to “establish formal memorandums of understanding (MOUs) with their civilian counterparts to establish or improve the flow of information between their agencies, especially in instances involving

military personnel.” These MOUs were to address, at a minimum, the following issues among others:

- Procedures for local law enforcement to immediately (within 4 hours) notify the installation law enforcement office of incidents and investigations involving service members;
 - Procedures for transmitting incident and investigation reports and other law enforcement information involving active duty service members from local civilian law enforcement agencies to the installation law enforcement office;
 - Procedures for transmitting military protection orders from the installation law enforcement office to the local civilian law enforcement agency with jurisdiction over the area in which any person named in the service member resides;
 - Respective responsibilities for providing information to victims regarding installation resources when either the victim or the alleged offender is an active duty service member;
 - Sharing of information and facilities during the course of an investigation; and,
 - Regular meetings between the local civilian law enforcement agency and the installation law enforcement office to review cases and MOU procedures.
- ¶ 4-17.a.: This provision required the entry of the military protective order imposed on SPC Giffa into the federal NCIC criminal records system and the documentation of any violations of the order.
 - ¶ 4-17.a.(1)-(2): These provisions required Fort Hood military law enforcement officials to notify local civilian law enforcement and judicial authorities of the issuance of the protective order, the individuals involved in the order, any changes in the order, and the termination of the order.

AR 27-10 “Military Justice”:

- ¶ 17-2.c.: This provision sets out Army policy on the victim and witness liaison program and states: “Effective victim and witness programs are multidisciplinary and utilize all related military and civilian agencies. Each victim/witness liaison must be familiar with all such agencies and programs to ensure that necessary services are provided. Multidisciplinary participants include, but are not limited to, investigative and law enforcement personnel, chaplains, healthcare personnel, Family advocacy/services personnel, (judge advocates) and other legal personnel, unit commanding officers and noncommissioned officers, and corrections/confinement facility personnel. In most instances, installations are expected to provide required services without referral to outside agencies.”

- ¶ 17-3.b.: This provision required that “special attention... be paid to victims of serious or violent crime” like Dawn Giffa.
- ¶ 17-8: This provision required SPC Giffa’s Commander or Fort Hood law enforcement officials to inform Dawn Giffa of her right to receive victim liaison services and of the name, title, and contact information for a victim liaison. The provision states that “[t]his notification is required in all cases, regardless of maximum punishment... or intended disposition of the case,” and mandates the use of Department of Defense Form 2701 (Initial Information for Victims and Witnesses of Crime) for the required notification.
- ¶ 17-8.c.: This provision required SPC Giffa’s Commander or Fort Hood law enforcement officials to report the notification of Dawn Giffa.
- ¶ 17-9.a.: This provision required Fort Hood military attorneys or their designees to “coordinate with military law enforcement, criminal investigative, and other military and civilian multidisciplinary agencies to ensure that victims and witnesses of crime are provided the name, location, and telephone number of a VWL (victim/witness liaison).”
- ¶ 17-9.a.: This provision required that, “at the earliest opportunity,” the Army “ensure that victims are informed of the (victim liaison services) and are provided a Victim/Witness Information Packet.”
- ¶ 17-10.a.(2): This provision acknowledged that, as a victim, Dawn Giffa had “[t]he right to be reasonably protected from the accused offender,” SPC Giffa.
- ¶ 17-11: This provision set out that, per Army policy, Dawn Giffa, as a victim, had “[t]he right to be reasonably protected from the accused offender,” SPC Giffa.
- ¶ 17-12.a.: This provision required Fort Hood “investigative or law enforcement personnel, the victim witness liaison, trial counsel, or other individuals with victim/witness assistance responsibilities” to inform Dawn Giffa “of the place where (she) may receive emergency medical care and social service support,” and, when necessary, to “provide appropriate assistance in securing such care.”
- ¶ 17-12.b.: This provision required the victim liaison or other Fort Hood representative to assist Dawn Giffa “in obtaining appropriate financial, legal, and other social service support by informing them of public and private programs that are available to provide counseling, treatment, and other support... including available compensation through Federal, State, and local agencies.” Further, this provision required the victim liaison to assist Dawn Giffa “in contacting agencies or individuals responsible for providing necessary services and relief.” Among the services included in the non-exhaustive list set out in this provision are the Army Community Services Program, Army Emergency Relief, Army Legal Assistance attorneys, and civilian community-based victim treatment, assistance, and compensation programs.

- ¶ 17-12.d.: This provision required that, if the above military services were not available, victim liaison “provide liaison assistance in seeking any available nonmilitary services within the civilian community.”
- ¶ 17-19.b.: This provision required the Staff Judge Advocate – the highest-ranking military attorney in the appropriate military unit – to “ensure that appropriate law enforcement agencies are immediately notified” when “the life, well-being, or safety of a victim or witness is jeopardized by... her participation in the criminal investigation or prosecution process.” Further, this provision required the prosecutor, victim liaison, or other relevant Fort Hood official to “immediately notify that Staff Judge Advocate whenever a victim or witness expresses genuine concern for his or her safety.”
- Appendix D “Victim/Witness Checklist”
 - This provision set out various actions required of Fort Hood officials. Among those actions were the following:
 - Ensure Dawn Giffa was provided the name and contact information of the victim witness liaison;
 - Inform Dawn Giffa of the right to receive the services detailed above and provide her with a Victim/Witness Information Packet;
 - Inform Dawn Giffa of her right to be reasonably protected from SPC Giffa;
 - Inform Dawn Giffa of the right to receive medical care and social care, and, if necessary, assist her in securing such care;
 - Assist Dawn Giffa in obtaining financial, legal, and other social service support by informing her of the military and/or civilian programs that were available to provide counseling, treatment, and other support.
 - Inform Dawn Giffa that “her interests are protected by criminal sanctions; that any attempted intimidation, harassment, or other tampering should be promptly reported to military authorities; and that (her) complaints will be promptly investigated...”

Fort Hood Commanding General’s Policy Letter #3 – “Army Family Advocacy Program (AFAP)”:

- ¶ 3.b.(1): This provision required Fort Hood “[c]ommanders and support agencies (to) ensure that the applicable rights of... victims... are addressed.” It further states:
 - “Commanders must take appropriate action to protect victims of abuse from further harm.”

- “Victim advocacy services are offered by the Army Community Services (ACS) and AFAP to address safety measures... provide advocacy assistance, crisis intervention and support to victims of domestic violence.”
- “If an Emergency Protective Order (EPO) or Domestic Violence Order (DVO) is in place, commanders will monitor the soldier’s compliance with such orders.”
- ¶ 3.b.(2): This provision required the Fort Hood Department of Social Work to provide treatment for Dawn Giffa and made the treating social worker responsible for the incident assessment.
 - ¶ 3.b.(5): This provision required Fort Hood commanders to “ensure that soldiers involved in family violence attend immediate and uninterrupted, recommended treatment.” Further, this provision required the Department of Social Work to provide SPC Giffa’s chain of command with confirmation of enrollment, an assessment of his risk level, and treatment information.
 - ¶ 3.b.(5): This provision required Fort Hood commanders to “ensure that junior leaders are actively engaged in the effective management of spouse/intimate partner and child abuse; high risk soldiers are identified; and offender accountability is addressed.”
 - ¶ 3.d: This provision set out the “minimum actions” required of Fort Hood commanders by the Fort Hood Commanding General in cases of spouse and child abuse. These actions include:
 - Contacting the victim of the domestic violence to ascertain the facts and identify any immediate safety concerns.
 - Make contact with the Family Advocacy Victim Advocate Program for an Installation Victim Advocate who will work in close coordination with the command as well as on/off post agencies to ensure that safety measures are in place for providing advocacy assistance and support to victims of domestic violence.
 - Determine whether the soldier is at risk for suicide or causing harm to others. If the commander determines that the soldier is at risk for doing so, “the Commander will ask the soldier if he or she possesses any firearms or intends to procure any firearms.”
 - If it is believed that the soldier is suicidal or homicidal – for example, due to previous threats, the involvement of weapons, increasing violence, extreme jealousy, or obsession with the victim – “he/she must be emergently referred for a psychiatric evaluation at the divisional or corps mental health unit serving the soldier’s unit.”

- Re-assess the situation at the end of the seven day period, and determine if the above restrictions should be modified, continued, or cancelled.
- Ensure the rights of the victim... are respected and observed.
- Utilize the command intervention process to ensure safety and support for military couples experiencing domestic violence.

Application of negligence law to the facts of this case

38. Defendant, the UNITED STATES OF AMERICA, through its agents and employees with the DEPARTMENT OF THE ARMY at Fort Hood's III Armored Corps, operating in Killeen, Bell County, Texas, was negligent in its treatment of SPC Giffa and his spouse, Dawn Larson Giffa. Defendant failed to comply with the duty it voluntarily undertook pursuant to the Army regulations listed above. These duties were nondiscretionary - as mandated by the Department of Defense, Department of the Army, and federal statute and regulation - with respect to a soldier who is accused of domestic violence off-base, thus placing not only Dawn Larson Giffa and her son in harm's way but also jeopardizing the personal safety of those people sheltering her, the Farina and Guzman families. The deaths of Dawn Larson Giffa, Lydia Farina and Steven Guzman and the severe personal injuries sustained by Tina Guzman, and all of the injuries, losses and damages resulting therefrom to all of the Plaintiffs in this action, were proximately caused by the negligence of the Defendant.

39. The United States of America, through its agency the Department of the Army, failed in its mandatory duties imposed by the Department of Defense and Department of the Army regulations, and federal statutes and regulations, in the following respects:

- (a) In failing to properly investigate the abuse suffered by Dawn Larson Giffa at the hands of SPC Giffa;
- (b) In failing to implement and enforce a valid "no-contact" order with respect to SPC Giffa;

- (c) In failing to implement and enforce a valid “7-day hold” on SPC Giffa;
- (d) In failing to properly counsel SPC Giffa;
- (e) In failing to maintain control over SPC Giffa;
- (f) In failing to remove any and all access to weapons from SPC Giffa, including but not limited to reporting his name and identifying information to the FBI’s National Instant Criminal Background Check System (NICS), or National Crime Information Center (“NCIC”) background check, to prevent him from buying a handgun after committing domestic violence against Dawn Giffa and violating a no-contact order;
- (g) In failing to advise Dawn Larson Giffa of her rights with regard to housing and financial and support and medical treatment, and in failing to provide her with such support;
- (h) In failing to protect Dawn Larson Giffa from further physical harm and further emotional trauma at the hands of SPC Giffa;
- (i) In failing to institute and/or comply with a cooperative approach with local authorities in protecting Dawn Larson Giffa;
- (j) In failing to conduct a spouse abuse safety risk assessment;
- (k) In failing to assist Dawn Larson Giffa in finding temporary housing, such as a motel or hotel, where her safety would be assured and the safety of those who were knowingly sheltering her after the abuse - the Farina and Guzman families - would not be placed in jeopardy;
- (l) In leaving Dawn Larson Giffa with no alternative but to remain with her neighbors with no money, no identification cards and no child care, thereby placing her and her neighbors in danger;
- (m) In failing to designate a victim advocate or liaison through which Dawn Larson Giffa could have obtained information and assistance in securing available victim/witness services;
- (n) In failing to institute a Memorandum of Agreement (MOA) with the city of Killeen, Texas and/or the Killeen Police Department with respect to procedures and protocols for responding to domestic violence issues that involve a service member and his or her spouse.
- (o) In failing to implement and/or follow any one or more of the mandatory obligations, duties and/or responsibilities created the various Department of

Defense/Department of the Army/Fort Hood regulations enumerated above in paragraph 37.

40. The United States of America, through its agency the Department of the Army, undertook and assumed the responsibilities and duties of the Killeen Police Department, representing to Dawn Larson Giffa that it would protect her from SPC Giffa. The Defendant, through its officials at Fort Hood, gratuitously took on a duty to police the off-base domestic violence of its soldier, SPC Giffa and to support and protect his spouse and so represented the same to Dawn Larson Giffa. Due to these assurances, Dawn Larson Giffa did not go back to the civilian police authorities or civilian courts, and instead relied on the Army. Accordingly, Defendant was required to use reasonable care in the discharge of this duty, having undertaken to provide services and protection to Dawn Larson Giffa. As a result, Dawn Larson Giffa relied upon this undertaking and believed that the Fort Hood personnel would exercise reasonable care in that regard. However, the Army violated and failed to follow its own mandatory regulations and failed to exercise reasonable care and thereby made the situation more dangerous to the health and safety of Dawn Larson Giffa, the Farina family, and the Guzman family. By failing to follow its own mandatory regulations after voluntarily undertaking to protect Dawn Larson Giffa from harm at the hands of SPC Giffa, Defendant increased the risk of harm to all Plaintiffs. Defendant's actions and omissions in that regard were the proximate cause of the injuries and damages suffered by the Plaintiffs.

41. The deaths of Dawn Larson Giffa, Lydia Farina, and Larry Steven Guzman were proximately caused by the negligence of the United States of America, through the Army. By taking over police functions for its soldier's off-base conduct, the Army interfered with local law enforcement to prevent SPC Giffa from being arrested, prosecuted, and likely convicted of a crime. In doing so, the Army took on the obligation of handling this matter itself. However, the Army

failed to arrest SPC Giffa for physically abusing his wife (according to FOIA responses, there is no record of SPC Giffa's arrest or detention). Likewise, the Army did not institute any proceedings of its own, and did not follow the requirements of Department of Defense and Army regulations and federal statutes and regulations concerning methods to deal with domestic violence (see above for specific references).

42. The Army was on full notice of the danger of this situation. SPC Giffa had already had a violent meltdown where he physically abused his wife, Dawn Larson Giffa, and the Army acted to rescue SPC Giffa from arrest by the Killeen police. Further, Dawn Larson Giffa told the Army Counselor in the mandatory family counseling meeting that SPC Giffa would kill her if released, and Dawn Larson Giffa told the Army on multiple occasions that SPC Giffa had her IDs (e.g., her Permanent Resident Card) and credit cards and refused to return the IDs and credit cards to prevent her from completing her nurse's degree, obtaining employment, and having the ability to leave any further than the Farina house. The Army took over the duty to recover the ID's, money and credit cards from SPC Giffa, but failed to do so, trapping Dawn Larson Giffa at the Farina house. The Army was also aware that Dawn was being sheltered by a neighboring family (the Farinas and Guzmans), across the street from SPC Giffa's home, in close proximity to where SPC Giffa would be if released, and exactly where he would go if released. The Army had every reason to be aware that it was placing Dawn Larson Giffa, the Farinas, and the Guzmans in danger by releasing SPC Giffa while not providing services to protect Dawn, not providing financial and relocation assistance to move Dawn Larson Giffa and K.L. to a hotel or other place of shelter, and not enforcing or properly implementing a no-contact order.

43. Likewise, Dawn Larson Giffa did not receive any of the support specified in Department of Defense and Army instructions, regulations, and orders for legal-assistance and

advice, financial and logistical support, and medical treatment and assessment. For example, she did not know – because the Army failed to advise her – that she was entitled to consult with military attorneys to advise on her “legal rights regarding housing and financial support, divorce, legal separation and child custody, transitional compensation, civil actions, and remedies available to (her) to enforce (her) legal rights and to protect (her) from further abuse.” The Army further failed to restrict SPC Giffa’s access to firearms. The Army failed to enter SPC Giffa’s military protective order into the NCIC criminal records database, failed to notify the Killeen Police Department and other local agencies of either the initiation or the termination of the military protective order, and failed to properly document each of SPC Giffa’s violations of that protective order. Had the Army entered SPC Giffa’s military protective order into the NCIC database, SPC Giffa would not have been able to purchase a handgun after committing domestic violence and being let go by the Army; the handgun used to kill his wife Dawn Larson Giffa, Lydia Farina, Steven Larry Guzman, and to shoot and attempt to kill Tina Guzman. The Army failed to notify the NCIC database that SPC Giffa was the subject of a military protective order, which would have alerted the Killeen Police that SPC Giffa had a no-contact order in place. After failing to inform local law enforcement authorities of the protective order and SPC Giffa’s multiple violations of it, the Army then failed to inform those civilian authorities that it had terminated the protective order, and that he was being released to return home to the Giffa residence in Killeen. By taking Giffa out of the civilian criminal justice system, and then not notifying the civilian criminal justice system that the Army was releasing Giffa even after he had violated the no-contact order, the Army in effect prevented a civilian court from preventing SPC Giffa from purchasing a gun and from coming within close proximity of Dawn Giffa and the neighbors who were sheltering her. By failing to follow these regulations, the Army left Dawn Larson Giffa trapped and in close proximity to SPC Giffa. Worse,

instead of following Army regulations and protecting Dawn and the neighbors who were providing her shelter, the Army tried to get her to move back in with SPC Giffa. These failures proximately caused the death of Dawn Larson Giffa, Lydia Farina, and Steven Larry Guzman, and the near-death injuries to Christina Guzman.

44. The Army's acts of interfering with law enforcement, while refusing to enforce the no-contact order, not preventing SPC Giffa from purchasing a gun, and failing to support Dawn Larson Giffa as a victim, do not support any policy of the United States Army. Stated another way, the US Army has no policy of covering up or enabling domestic abuse and allowing abusers to buy handguns. Accordingly, the discretionary function test does not apply. Moreover, the regulations, instructions, orders, and statutes cited above are specific orders and regulations that were not followed, and these failures proximately caused the deaths and injuries of February 22, 2015.

45. The Army, by and through its Officers, Non-Commissioned Officers and Military Police, undertook a duty, acted negligently, and the foreseeable consequences of that negligence came to bear. Three civilians were murdered, and another was severely injured. Five children were orphaned. Parents lost their children. A husband lost his wife. A wife lost her husband and was shot in the face and neck.

DAMAGES FOR THE DEATH DAWN LARSON GIFFA

46. Plaintiffs allege that all damages suffered by **Dawn Larson Giffa, K.L., Karen Kristensen and Donald Larson** were proximately caused by the actions, failures and omissions of Defendant the United States of America.

47. DAWN LARSON GIFFA was 29 years old at the time of the incident in question. At this time, her life expectancy was 86 years, according to the most recent United States Life

Tables, a copy of which will be used in evidence during this case. Prior to this occurrence and her tragic death, Dawn Larson Giffa was a loving and devoted mother and daughter and was providing her son, K.L. not only financial support but was giving him care, nurture, counsel, advice, education and affection. Dawn Larson Giffa was providing her mother, KARIN KRISTENSEN and her father, DONALD LARSON, with a daughter's care, love and affection.

48. As a direct and proximate result of the negligence of the Defendant, Dawn Larson Giffa suffered severe physical pain, mental anguish, and trauma up to the moment of her death for which her estate now has the right to recover monetary damages. Pursuant to the Texas Survival Statute, Tex. Civ. Prac. & Rem. Code, Section 71.021, Plaintiff **Karin Kristensen, as Administratrix of the Estate of Dawn Larson Giffa**, brings this action as a claim for the Estate of Dawn Larson Giffa, for the recovery of (a) the pain and suffering and mental anguish that Dawn Larson Giffa experienced as a result of the incident in question and (b) reasonable funeral and burial expenses incurred for the internment of Dawn Larson Giffa.

49. Pursuant to *Section 71.001, Tex. Civ. Prac. & Rem. Code*, the Texas Wrongful Death Statute, **Plaintiff Karin Kristensen and Plaintiff Donald Larson**, the surviving mother and father of Dawn Larson Giffa, are entitled upon final trial to have the court consider the sum of money that will fully and fairly compensate them in the past and future for the following elements of damage: (a) pecuniary loss which means the loss of care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that Dawn Larson Giffa would have provided to them had she lived; and (b) mental anguish which means the emotional pain and torment and suffering that Plaintiffs Karin Kristensen and Donald Larson have experienced and will experience in the future because of the tragic death of their daughter, Dawn Larson Giffa.

50. Under *Section 71.001, Tex. Civ. Prac. & Rem. Code*, the Texas Wrongful Death Statute, **K.L., as the surviving minor child of Dawn Larson Giffa** is entitled upon final trial to have the court consider the sum of money that will fully and fairly compensate him in the past and future for the following elements of damage: (a) pecuniary loss which means the loss of care, maintenance, support, services, advice, counsel, and reasonable contributions of pecuniary value, excluding loss of inheritance, that K.L. in reasonable probability, would have received from his mother had she lived; (b) loss of companionship and society which means the loss of positive benefits flowing from the love, comfort, companionship, advice, counsel, supervision and society that K.L. would have received from his mother, Dawn Larson Giffa, had she lived; (c) mental anguish which means the emotional pain and torment and suffering that K.L. has experienced in the past and will experience in the future because of the death of his mother; (d) the termination of the mother-son relationship including damages to the family relationship that K.L. has suffered because of the death of his mother; (e) loss of inheritance which means the loss of the present value of the assets that Dawn Larson Giffa would have added to her estate and left at her natural death to her son K.L.. The minor child, K.L. was 3 years old at the time of the incident in question and at that time his life expectancy was approximately 84 years according to the most recent United States Life Tables, a copy of which will be used in evidence during the trial of this case.

DAMAGES TO THE FARINA FAMILY

51. Plaintiffs allege that all damages suffered by **Michael Farina, Lydia Farina, J.W.F., E.F. M.F. K.F., and Beverly Merrick** were proximately caused by the actions, failures and omissions of Defendant the United States of America.

52. LYDIA FARINA was 31 years old at the time of the incident in question. At this time, her life expectancy was 86 years, according to the most recent United States Life Tables, a

copy of which will be used in evidence during this case. Prior to this occurrence and her tragic death, Lydia Farina was a loving and devoted wife, mother and daughter and was providing her family not only financial support but was giving them care, nurture, counsel, advice, education and affection.

53. As a direct and proximate result of the negligence of the Defendant, Lydia Farina suffered severe physical pain, mental anguish, and trauma up to the moment of her death for which her estate now has the right to recover monetary damages. Pursuant to the Texas Survival Statute, *Tex. Civ. Prac. & Rem. Code, Section 71.021*, **Plaintiff Michael Farina, as Representative of the Estate of Lydia Farina**, brings this action as a claim for the Estate of Lydia Farina, for the recovery of (a) the pain and suffering and mental anguish that Lydia Farina experienced as a result of the incident in question, and (b) reasonable funeral and burial expenses incurred for the internment of Lydia Farina.

54. Pursuant to *Section 71.001, Tex. Civ. Prac. & Rem. Code*, the Texas Wrongful Death Statute, **Michael Farina, Individually as the surviving spouse of Lydia Farina**, is entitled upon final trial to have the court consider the sum of money that will fully and fairly compensate him in the past and future for the following elements of damage: (a) pecuniary loss which means the loss of care, maintenance, support, services, counsel and reasonable contributions of a pecuniary value that Lydia Farina, in reasonable probability, would have provided to her husband had she lived; (b) loss of consortium, including loss of companionship and society which means the loss of positive benefits flowing from the love, comfort, companionship and society that Michael Farina would have received from his wife, Lydia Farina, had she lived; (c) mental anguish which means the emotional pain and torment and suffering that Michael Farina has experienced and will experience in the future because of the tragic death of his wife and the mother of his

children; (d) the termination of the spousal relationship including the damages to the family relationship that Michael Farina has suffered because of the death of his wife and the mother of his children; and (e) loss of inheritance which means the loss of the present value of the assets that Lydia Farina would have added to her estate and left at her natural death to her husband and children.

55. Pursuant to *Section 71.001, Tex. Civ. Prac. & Rem. Code*, the Texas Wrongful Death Statute, **Plaintiff Beverly Merrick, the surviving mother of Lydia Farina**, is entitled upon final trial to have the court consider the sum of money that will fully and fairly compensate her in the past and future for the following elements of damage: (a) pecuniary loss which means the loss of care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that Lydia Farina would have provided to them had she lived; and (b) mental anguish which means the emotional pain and torment and suffering that Beverly Merrick has experienced and will experience in the future because of the tragic death of her daughter, Lydia Farina.

56. Under *Section 71.001, Tex. Civ. Prac. & Rem. Code*, the Texas Wrongful Death Statute, **J.W.F, E.F., M.F. AND K.F., as the surviving minor children of Lydia Farina** are entitled upon final trial to have the court consider the sum of money that will fully and fairly compensate each of them in the past and future for the following elements of damage: (a) pecuniary loss which means the loss of care, maintenance, support, services, advice, counsel, and reasonable contributions of pecuniary value, excluding loss of inheritance, that they, in reasonable probability, would have all received from their mother had she lived; (b) loss of companionship and society which means the loss of positive benefits flowing from the love, comfort, companionship, advice, counsel, supervision and society that they would have all received from

their mother, had she lived; (c) mental anguish which means the emotional pain and torment and suffering that they have all experienced in the past and will experience in the future because of the death of their mother; (d) the termination of the mother-son and mother-daughter relationships, including damages to the family relationship that the four minor children of Lydia Farina have suffered because of the death of their mother; (e) loss of inheritance which means the loss of the present value of the assets that Lydia Farina would have added to her estate and left at her natural death to her husband and children.

57. The minor child, **J.W.F.** was 4 years old at the time of the incident in question and at that time his life expectancy was approximately 84 years according to the most recent United States Life Tables, a copy of which will be used in evidence during the trial of this case. The minor child, **E.F.** was 6 years old at the time of the incident in question and at that time her life expectancy was approximately 87 years according to the most recent United States Life Tables, a copy of which will be used in evidence during the trial of this case. The minor child, **M.F.**, was 8 years old at the time of the incident in question and at that time his life expectancy was approximately 84 years according to the most recent United States Life Tables, a copy of which will be used in evidence during the trial of this case. The minor child, **K.F.** was 9 years old at the time of the incident in question and at that time her life expectancy was approximately 87 years according to the most recent United States Life Tables, a copy of which will be used in evidence during the trial of this case.

DAMAGES TO THE GUZMAN FAMILY

58. Plaintiffs allege that all damages suffered by **Steven Guzman, Christina Guzman, M.F. and Marina Lynn Ellis** were proximately caused by the actions, failures and omissions of Defendant the United States of America.

59. Steven Guzman was 42 years old at the time of the incident in question. At this time, his life expectancy was 84 years, according to the most recent United States Life Tables, a copy of which will be used in evidence during this case. Prior to this occurrence and his tragic death, Steven Guzman was a loving and devoted husband and father and was providing his family not only financial support but was giving them care, nurture, counsel, advice, education and affection.

60. As a direct and proximate result of the negligence of the Defendant, **Steven Guzman** suffered severe physical pain, mental anguish, and trauma up to the moment of his death for which his estate now has the right to recover monetary damages. Pursuant to the Texas Survival Statute, Tex. Civ. Prac. & Rem. Code, Section 71.021, **Plaintiff Christina Guzman, as Representative of the Estate of Steven Guzman**, brings this action as a claim for the Estate of Steven Guzman, for the recovery of (a) the pain and suffering and mental anguish that Steven Guzman experienced as a result of the incident in question, and (b) reasonable funeral and burial expenses incurred for the interment of Steven Guzman.

61. Pursuant *to Section 71.001, Tex. Civ. Prac. & Rem. Code*, the Texas Wrongful Death Statute, **Christina Guzman, as the surviving spouse of Steven Guzman**, is entitled upon final trial to have the court consider the sum of money that will fully and fairly compensate her in the past and future for the following elements of damage: (a) pecuniary loss which means the loss of care, maintenance, support, services, counsel and reasonable contributions of a pecuniary value that Steven Guzman, in reasonable probability, would have provided to his wife had she lived; (b) loss of consortium, including loss of companionship and society which means the loss of positive benefits flowing from the love, comfort, companionship and society that Christina Guzman would have received from her husband, Steven Guzman, had he lived; (c) mental anguish which means

the emotional pain and torment and suffering that Christina Guzman has experienced and will experience in the future because of the tragic death of her husband; (d) the termination of the spousal relationship including the damages to the family relationship that Christina Guzman has suffered because of the death of her husband; and (e) loss of inheritance which means the loss of the present value of the assets that Steven Guzman would have added to his estate and left at his natural death to his husband and children.

62. Under *Section 71.001, Tex. Civ. Prac. & Rem. Code*, the Texas Wrongful Death Statute, **M.F. and Marina Lynn Ellis, as the surviving daughters of Steven Guzman** are entitled upon final trial to have the court consider the sum of money that will fully and fairly compensate each of them in the past and future for the following elements of damage: (a) pecuniary loss which means the loss of care, maintenance, support, services, advice, counsel, and reasonable contributions of pecuniary value, excluding loss of inheritance, that they, in reasonable probability, would have all received from their father had he lived; (b) loss of companionship and society which means the loss of positive benefits flowing from the love, comfort, companionship, advice, counsel, supervision and society that they would have received from their father, had he lived; (c) mental anguish which means the emotional pain and torment and suffering that they have experienced in the past and will experience in the future because of the death of their father; (d) the termination of father-daughter relationship, including damages to the family relationship that the daughters of Steven Guzman have suffered because of the death of their father; (e) loss of inheritance which means the loss of the present value of the assets that Steven Guzman would have added to his estate and left to his wife and daughters at the time of his natural death.

63. Plaintiff, **Christina Guzman**, who was severely and permanently injured in the incident in question, was 43 years old at the time and her life expectancy was approximately 87

years, according to the most recent United States Life Tables, a copy of which will be used in evidence during the trial of this case. As a result of the occurrence in question, Plaintiff Christina Guzan required emergency medical treatment, hospitalizations, and surgeries. She sustained gunshot wounds to her face and neck. After she heard the shot that murdered her husband, she went to her daughters to protect them and fought to stay conscious. The bullet wounds to Christina Guzman's face and neck have required numerous surgeries and substantial medical treatment and expenses. One of the gunshot wounds went through both of her cheeks, damaged her jaw and destroyed some of her teeth. The other gunshot wound was in the neck and shoulder area. She suffers horrific and permanent disfigurement and impairment and will continue to have ongoing medical needs and treatment. Christina Guzman suffers from many manifestations of mental anguish including depression, anxiety, and severe nightmares. She reacts to loud noises and lights due to the trauma of the gun's muzzle blast three feet from her face. She reacts to sirens, sees a psychiatrist, and attends grief counseling and pain management. Her injuries are permanent, disabling, disfiguring and painful. She will require life-long evaluation and treatment. Plaintiff Christina Guzman requests that the court determine the following elements of damages to be considered separately and individually for the purpose of determining the sum of money that will fairly and reasonably compensate her for (a) the physical pain and mental anguish that she has suffered in the past and will suffer in the future; (b) the amount of reasonable hospital, medical and nursing expenses necessarily provided and incurred in the treatment of her injuries from the date of the incident in question to the time of trial and such amounts as will be incurred through her life expectancy; (c) the physical and mental impairment that she has suffered and the resulting inability to do those tasks and services that she ordinarily would have been able to perform from the date of this incident to the time of trial and throughout her life expectancy; (d) the physical

disfigurement that she has suffered as a result of the incident up to the time of trial and will continue to suffer from throughout her life expectancy; (e) the loss of earnings and earning capacity that she has suffered as a result of the incident and will continue to suffer throughout her work-life expectancy; and (f) the mental anguish that she endured as a witness to the murder of her husband.

CONCLUSION

64. Nothing that Plaintiffs did or failed to do contributed in any way to the injuries and damages described above.

65. Plaintiffs are entitled to recover the maximum lawful post-judgment interest on their damages as permitted and provided by the FTCA, and Texas common and statutory law.

66. Plaintiffs respectfully reserve the right to amend and/or supplement this complaint as discovery of facts require.

WHEREFORE, Plaintiffs pray for judgment against Defendant as follows:

- a. For general and special damages;
- b. For post-judgment interest as allowed by law;
- c. For cost of suit incurred herein; and
- d. For such other and further relief as this Court may deem just and proper.

RESPECTFULLY SUBMITTED,

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