

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DESIREE MARTINEZ,

Plaintiff - Appellant,

v.

CITY OF CLOVIS, et al.

Defendants-Appellees.

No. 17-17492

D.C. No. 1:15-cv-00683-JAM-SKO
Eastern District of California, Sacramento

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

Based on the Complaint for Damages and Declaratory Relief filed on May 1, 2015, the district court had subject matter jurisdiction over this civil action pursuant to 28 U.S.C. §§ 1331 and 1343. Docket Number (“Dkt. No.”) 1; ER 81. This Court has appellate jurisdiction over the district court’s summary judgment rulings and corresponding Federal Rule of Civil Procedure 54(b) partial judgment filed on December 6, 2017, pursuant to 28 U.S.C. § 1291. Dkt. Nos. 91, 94, 96, 103, 104; ER 3, 5, 9, 11, 15. This Court also has jurisdiction to review the merits of this appeal, as the notice of appeal was timely filed in accordance with Federal Rule of Appellate Procedure 4(a) on December 17, 2017. Dkt. No. 107; ER 1.

STATEMENT OF ISSUES PRESENTED

This appeal presents the following issues:

1. Whether the district court’s grant of qualified immunity to police officers Angela Yambupah, Fred Sanders and Kristina Hershberger was warranted as to Appellant Desiree Martinez’s substantive due process claim, when there was evidence that the officers were all well aware that her domestic abuser should have been arrested and ordered restrained, knew that he had committed serious crimes, also knew that he could harm her again if they acted with indifference to their law

enforcement obligations and her requests for service, and they had no legitimate reason for refusing to act?

2. Whether the district court's dismissal of Appellant's negligence claim against her abuser's parents was warranted, when the district court found that their actions may have harmed her, and every person has a state law duty not to cause foreseeable harm to another?

STATEMENT OF THE CASE

Appellant Desiree Martinez ("Martinez") filed this action on May 4, 2015. Dkt. No. 1; ER 81. After two amendments and two rounds of Federal Rule of Civil Procedure 12 motions, the operative pleading was the Second Amended Complaint, which was issue below as to all of the named defendants: Kyle Pennington ("Kyle"),¹ Kim Pennington ("Kim"), Connie Pennington ("Connie"); Kristina Hershberger ("Hershberger") Jesus Santillan ("Santillan"), Channon High ("High), the City of Clovis ("Clovis"), Angela Yambupah ("Yambupah"), Ralph Salazar ("Salazar"), Fred Sanders ("Sanders"), and the City of Sanger ("Sanger"). *See* Dkt. Nos. 6, 18, 31, 32, 43, 44, 46, 47, 55, 58; ER 81, 103, 128, 147, 154, 168, 182, 208, 222, 234, 244.

The Second Amended Complaint included the following claims for relief: (1)

¹The Penningtons are referred to by their first names for the sake of clarity.

42 U.S.C. § 1983, municipal liability - denial of substantive due process and equal protection, against Clovis and Sanger; (2) 42 U.S.C. § 1983, individual liability, against Hershberger, Santillan, High, Yambupah, Salazar and Sanders; (3) 42 U.S.C. § 1985(2), conspiracy to intimidate state criminal witnesses, against Kyle, Kim and Connie; (4) California Civil Code § 51.7, gender-based threats, violence and intimidation, against Kyle; (5) California Civil Code § 52.4, gender violence and sexual abuse, against Kyle; (6) California Civil Code §§ 1708.5, 1708.6, domestic and sexual violence, against Kyle; (7) California common law and California Civil Code § 3520, battery, against Kyle; (8) Civil Conspiracy to Violate Civil Code §§ 51.7, 52.4, 1708.5, 1708.6, and to Commit Battery, against Kyle, Kim and Connie; (9) California common law and Civil Code § 1714, negligence, against Kim and Connie. Martinez sought compensatory and punitive damages, and ancillary relief, including a permanent injunction against Kyle under both federal and state law. Dkt. No. 44; ER 182.

The Second Amended Complaint is based on the following factual allegations:

Martinez started dating Kyle in February 2013. At his insistence and due to his trickery, they began living together soon thereafter. Shortly after they began living together, Kyle began the cycle of abuse of Martinez, which included being controlling and isolating Martinez from friends and family, and being critical, intimidating and temperamental with her. By April 2013, Kyle had become violent toward Martinez. The first violent episode occurred when Martinez and Kyle were out of

town and stayed at a hotel in Dublin, California in April 2013. Kyle attacked and choked Martinez, and then prevented her from either leaving the hotel room or calling for help. This pattern of violence would escalate over the next several months of their relationship, and included abuse of an emotional, physical and sexual nature.

After the April 2013 abuse and the frequent abuse that followed, Kyle would manipulate Martinez in an attempt to dissuade her from leaving him or reporting his abuse. One tactic Kyle used was to appeal to Martinez's sympathy. Kyle would frequently invoke the fact that he was already under investigation by the Clovis Police Department for abusing his prior significant other, K.I., and that he would likely lose his job if Martinez made additional reports. Kyle also would invoke the fact that his military benefits could be at stake if Martinez reported the abuse and he was then prosecuted and convicted. Kyle would alternatively demean Martinez in an attempt to keep her quiet, telling her that he was a peace officer with a graduate degree and that she was nothing by comparison and would not be believed any more than others who had attempted to make reports in the past. If appeals to Martinez's sympathy or attacks on her self-esteem did not work, Kyle would threaten her with further abuse, telling her that he could find her wherever she went, showing her photos he collected of people killed in military action and telling her he could do the same thing to her and her daughter. As the abuse continued, Kyle would also attempt to dissuade Martinez by telling her that no one would believe her, since she had not reported or had denied prior incidents of his abuse. Kyle also relied on his superior knowledge of the law to convince Martinez that her various attempts to defend herself were also "abuse" and that any investigation would likely result in their both being arrested. Finally, Kyle would sometimes threaten to harm or kill himself if Martinez reported his abuse.

Despite the fear and hopelessness that resulted from Kyle's abuse and manipulation, and out of sheer necessity to keep her and her daughter safe, Martinez did report several instances of Kyle's abuse to law enforcement. These reports were made either to the Clovis Police Department or the Sanger Police Department. Unfortunately, due to Clovis' and Sanger's customs, policies and/or practices of insensitivity

toward domestic violence victims and lax enforcement of domestic violence laws, and the improprieties of their responding officers, most of Martinez's reports were unavailing. These reports were unavailing because the involved officers failed to provide Martinez with the services that she was entitled to as a victim of domestic violence, and some of these failures directly resulted in additional harm to her. Specifically:

- On May 2, 2013, Martinez reported Pennington's abuse when he threatened her with harm while she was at her cousin's house. Officers Hershberger and Santillan from the Clovis Police Department responded. Officer Santillan was personal friends with Kyle. These officers did not separate Martinez and Kyle and remove them from each other's sight and earshot, as recommended by California Police Officers Standards and Training (POST). There was plenty of opportunity to effectively separate Martinez and Kyle, but this was not done, although officers are trained as to the potential consequences of requiring a domestic violence victim to give her statement in her abuser's presence. As a result of these failures, and due to intimidation from Kyle, Martinez gave equivocal accounts to Officer Hershberger that permitted her to determine that there was a lack of probable cause. Instead, Martinez and Kyle were left to stay together that evening, and no prior effort was made to propose a cooling off period, make a peaceful conduct order, offer Martinez placement in a women's shelter, or to search or inquire whether weapons were present in their residence. Martinez also was not informed of her right under California law to make a private person's arrest. Martinez also was not informed of her rights to seek emergency or long term restraining orders against Kyle.
- Officers Hershberger's and Santillan's failure to provide Martinez with the services that she was entitled to as a victim of domestic violence resulted in additional harm to her. After Officers Hershberger and Santillan left, Martinez suffered further physical and emotional abuse from Kyle. Kyle also

outlined a statement for Martinez to recite to the detective that Kyle knew from his law enforcement experience would be contacting her to follow up. Intimidated and injured, Martinez avoided personal contact with the assigned detective, Iri Guerra, and dutifully gave the statement Kyle had outlined for her when she had a telephone interview with him on May 3, 2013. Det. Guerra in his interview of Martinez did not advise her citizen arrest or restraining order rights, or of her right under California Penal Code § 679.05(b) to have the support of a domestic violence advocate.

- On May 21, 2013, Martinez reported Kyle's abuse to another Clovis Police Officer, Gary Taylor, whom she had known before she met Kyle. Martinez showed Officer Taylor injuries she had sustained as a result of Kyle's abuse. Officer Taylor did not make a contemporaneous report of the pattern of abuse Martinez recounted to him, although California Penal Code Section 13730(c) requires written incident reports for all domestic violence allegations. Officer Taylor also did not inform Martinez of her citizen arrest rights or her rights to seek emergency and long term restraining orders. Indeed, Officer Taylor did not disclose his contact with Martinez until she made a related call to the Clovis Police Department on May 29th.
- Kyle was advised by another member of the Clovis Police Department of Martinez's May 21 contact with Officer Taylor the very same day. Confidential reports of domestic violence are not supposed to be disclosed to the potential suspect, since under California Penal Code § 13701(b), the intent of California's domestic violence laws is to "protect victims of domestic violence from continuing abuse." When Kyle found out that Martinez has contacted law enforcement, he again physically abused her.
- Martinez re-contacted Officer Taylor on May 22, and she showed him the fresh injuries that resulted from Kyle's abuse the night before. Again, Officer Taylor did not do an incident

report or disclose his contact with Martinez for another week. Officer Taylor again did not advise Martinez of her citizen arrest, restraining order rights, or any other rights that domestic violence victims have.

- On May 29, 2013, Martinez made an anonymous call to the Clovis Police Department to report that her boyfriend was abusing her and to seek related legal information. A call for service was generated based on this call. Believing that the call might be assigned to him, Officer Taylor advised his sergeant, Tom Roberts, that he had prior contact with Martinez on May 21 and 22 and therefore had a conflict of interest. It was also disclosed by Officer Taylor that this call for service related to Kyle, one of the department's own officers. It does not appear that this call for service was thereafter assigned to any officer; instead, Sgt. Roberts called Martinez and spoke to her briefly while Kyle was present with her. Sgt. Roberts also did not advise Martinez of her citizen arrest or restraining order rights, or her right to the support of a domestic violence advocate.
- Kyle was also contacted by High and told about Martinez's anonymous call. A few days after the incident, Kyle received a call from High in Martinez's presence, which he put on speaker to confront Martinez. High told Kyle that Martinez had called and tried to report abuse by him. Again, this was highly improper.
- As a direct result of High's improper disclosure of Martinez's anonymous call, Martinez suffered one of the worst periods of abuse by Kyle, between June 1 and 4, 2013. Kyle by then had moved Martinez from his Clovis residence to his house in Sanger, in an effort to avoid further possible reports to the Clovis Police Department by Martinez. During that same time period, Kyle repeatedly berated, insulted, threatened and intimidated Martinez because of her attempts to report him. When on June 3, 2013 Martinez attempted to leave the Sanger residence and escape his abuse, Kyle attempted to block the

door. When Martinez attempted to call law enforcement, Kyle ripped the phone from her hand. Kyle proceeded to choke, beat, drag, and suffocate Martinez, all while he was verbally threatening to harm and kill her. Later that day, as further punishment, Kyle forcibly sodomized, degraded and humiliated Martinez. Kyle also prepared another outline for Martinez to follow in case she was contacted as part of any follow-up investigation.

- On the early morning of June 4, 2013, Sanger Police Officers Yambupah and Salazar and Sgt. Sanders were dispatched to Kyle's Sanger residence. Officers Yambupah and Salazar were dispatched in response to 911 calls from neighbors and passersby who saw the abuse. Martinez had many obvious injuries from the beating she had sustained. However, Martinez and Kyle were not separated and removed from each other's line of sight and earshot. As a result, the intimidated Martinez expressed a desire not to "press charges," although she also whispered that Kyle abused her and she escaped because she thought he was going to kill her. Officer Yambupah and Salazar and/or Sgt. Sanders had the authority to arrest Kyle, but they did not, despite the "pro-arrest" policy in domestic violence cases, even in cases that the officers might suspect would ultimately be charged as misdemeanors or might not result in successful prosecution. Upon leaving, the officers' final comments to Martinez were that the Penningtons were "good people," that Kyle was an officer, and his father was a Sanger Police Officer. Officers Yambupah, Salazar and/or Sgt. Sanders failed to advise Martinez of her citizen arrest and restraining order rights. Officers Yambupah, Salazar and/or Sgt. Sanders did not ask or make a recommendation regarding Martinez's being taken to a battered women's shelter, and they did not provide her with any materials informing her of her rights as a domestic violence victim under state or federal law. Officers Yambupah, Salazar and/or Sgt. Sanders failed to make any peaceful conduct orders prior to leaving the premises. Officer Yambupah also failed to complete her report or turn

over the photographs she took prior to ending her shift and had to be asked to return to work after her shift to complete her report and produce her photos. The failure of Officers Yambupah, Salazar and Sgt. Sanders to provide Martinez with the services that she was entitled to as a victim of domestic violence resulted in additional harm to her. Specifically, the actions of Officers Yambupah, Salazar and Sgt. Sanders in failing to intervene more effectively resulted in Martinez's being beaten and sexually assaulted again on June 4, 2013.

- Martinez managed to alert both the Clovis and Sanger Police Departments yet again about this abuse. Martinez's alerting both agencies and requesting action finally resulted in the issuance of an arrest warrant being issued for Kyle on June 5, 2013. A search warrant was also issued for his residence that same day. Kyle was subsequently charged with violations of California Penal Code §§ 273.5 (domestic violence - June 4, 2013 and May 21, 2013 incidents), 236 (false imprisonment), 245(a)(4) (assault-great bodily injury), 422 (criminal threats), 136.1 (dissuading a witness), and 273.6 (violation of a restraining order).
- Even after his June 2013 arrest, Kyle continued to abuse Martinez, and Kim and Connie, through either intentional or negligent conduct, assisted him in concealing his actions. Kyle and his parents began to engage in concerted action intended to conceal the abuse Martinez was suffering and also to enable Kyle to continue violating the restraining order that was by then in effect. It was important for Pennington, although he was the subject of a restraining order, to keep Martinez close so that he could intimidate her from testifying at his upcoming criminal trial. On multiple occasions in July 2013, Kyle physically and sexually abused Martinez. Kyle caused Martinez to nearly overdose on a large dosage of medicine he gave her, and he and Connie opted not to seek medical assistance for the unconscious Martinez for fear of how it might impact Kyle's then pending criminal case. Kim, a peace officer and mandated reporter, also

concealed the abuse to which Martinez was being subjected and Kyle's restraining order violations. Indeed, on more than one occasion when Martinez was in the car with Kim, he made her duck down and hide whenever law enforcement was nearby. These are hardly the actions of a peace officer trained in domestic violence.

- Kyle's physical and emotional abuse of Martinez continued in August 2013. Although Connie had obvious knowledge of this abuse, some of which she witnessed, she did not call the police to advise them what her son had done to Martinez. Instead, Connie told Martinez that they decided that they "did not need to get the police involved." Kim and Connie also intentionally or negligently assisted Kyle in violating the restraining order, including assisting Kyle move himself and Martinez into another residence in Sanger. In connection with another episode of abuse in August 2013, Martinez became so hopeless and despondent that she took a potential overdose of medication. Before she lapsed into unconsciousness, she thought of her daughter and called for assistance. This incident resulted in Martinez's being taken in on a 5150 hold.
- Kyle's abuse of Martinez continued into September 2013. High and another Clovis Police Department records clerk yet to be identified would alert Kyle calls for service by Martinez reporting Kyle's violation of the June 2013 restraining order. Kyle abused Martinez when he learned of these incidents, including on September 18, 2013, where he administered her an especially brutal beating that led to his arrest. Prior to submitting to arrest, Kyle left with Martinez's daughter and was texting Martinez indicating that he was going to harm either himself and/or Martinez's daughter. High's betrayal of Martinez's confidentiality as a domestic violence victim was especially heinous, since the violation of a domestic violence restraining order is a "shall arrest" crime due to the recognized threat that a restraining order violator represents. High's betrayal also had all of the terrible consequences set forth above

in this paragraph.

- Until September 18, 2013, despite Martinez's numerous reports and the many abuse incidents, Pennington was never arrested for continuing to cohabit with, intimidate, and abuse Martinez after the June 2013 restraining order was issued. It was only after his September 18th arrest that Kyle was finally forced to move away from Martinez for the first time since he began abusing her.
- By October 2013, Martinez had moved back to Clovis, yet the restrained Kyle insisted in harassing and intimidating her in an effort to dissuade her from testifying. Kyle was not alone in these efforts; Connie also would contact Martinez for the same purpose, and Kim, a peace officer and mandated reporter, concealed these damning facts. Some of these unlawful contacts occurred when Martinez was in meetings with the District Attorney's Office prosecuting Kyle, yet he was not arrested. Indeed, despite numerous reports to the Clovis Police Department of a "shall arrest" crime, no one at the Clovis Police Department ever arrested Kyle for violating the restraining order. Martinez's reports were typically corroborated by text messages, phone records, computer screenshots, etc.

Despite continued harassment from Kyle and his family, including their specific requests that she either refuse to testify or testify falsely, the prosecution of Kyle was ultimately successful. Kyle was held to answer at a December 2013 preliminary hearing, and the charges against him went to trial in April 2014. At that trial, the jury convicted Kyle on multiple counts of violating the June 2013 restraining order but hung on the other charges. In July 2014, in order to avoid a retrial, Kyle pleaded guilty to one domestic violence charge. Martinez and her daughter also were granted a ten year restraining order as part of Kyle's sentencing.

As a result of the foregoing misconduct of the defendants, the physical and emotional injuries to Martinez can hardly be overstated. Kyle also made it impossible for Martinez to keep working, thus causing

substantial economic losses. Martinez also had to endure the stress of court proceedings, including being dragged through the mud on the witness stand by Kyle's ruthless attorney.

Martinez's life has been turned upside down as a result of the defendants' misconduct. Martinez felt compelled to leave the area where she grew up and where her family and friends are, and she now lives under an alias in a far away confidential location and receives her mail at yet another location to have it then confidentially forwarded to her. Martinez lives in constant fear of Kyle to this day, and does not feel sufficiently safe to work or do anything else that would require her to be out alone for any lengthy period. Martinez had been diagnosed with post-traumatic stress disorder and will likely require many more years of treatment. Martinez is also concerned and distressed about the damage that has been done to her daughter's mental health as a result of their ordeal.

Dkt. No. 44, ¶¶ 16-21; ER 182, 186-195.

Kim and Connie filed a motion for summary judgment on August 9, 2017, and Hershberger, High, Clovis, Yambupah, Sanders and Sanger filed a similar motion on August 15, 2017.² Dkt. Nos. 75-77. Martinez opposed these motions. Dkt. Nos. 78-79. All parties submitted evidence in support of their positions. ER 259-1254.

At a hearing held on October 17, 2017, the district court ruled on the summary judgment motions as follows:

(1) The district court granted summary judgment motions as to all claims against Hershberger, Yambupah, Sanders, Clovis and Sanger;

²By this point in the proceedings Santillan and Salazar had been dismissed via stipulation. Dkt. Nos. 69-70.

(2) The district court granted summary judgment as to the equal protection claim against High but denied summary judgment as to the substantive due process claim against her; and

(3) The district court granted summary judgment as to the 42 U.S.C. § 1985(2) and negligence claims against Kim and Connie but denied summary judgment as to them regarding the civil conspiracy claim. Dkt. Nos. 91, 94; ER 11, 15. These rulings were memorialized in a judgment and then, pursuant to stipulation, a partial judgment in compliance with Federal Rule of Civil Procedure 54(b). Dkt. No. 96, 103, 104; ER 3, 5, 9.

Martinez filed a timely notice of appeal on December 17, 2017. Dkt. No. 107; ER 1.

This appeal ensues.

STATEMENT OF FACTS

The summary judgment record must be construed favorably to the non-movant. Accordingly, the following facts have to be accepted for this appeal:

I. Officer Hershberger and the May 2, 2013 Incident

Officer Hershberger was the supervisor on scene for a May 2, 2013 call for service involving Kyle and Martinez. Hershberger Deposition, 5:24-6:4; ER 1178.

Hershberger was asked to write the report of the incident because the call for service involved an officer from the Clovis Police Department, and she was the shift supervisor on duty. Hershberger Deposition, 9:20-10:3; ER 1179. Hershberger was a longtime work colleague of Kyle's. Hershberger Deposition, 10:22-12:9; ER 1179-1180.

Officer Hershberger denied that Martinez told her she had been pushed down stairs by Kyle earlier that evening and recalled instead that Martinez only mentioned prior domestic violence that she later recanted. Hershberger Deposition, 20:6-17; 33:15-34:1; ER 1182, 1185. Officer Hershberger testified she was aware of domestic violence victimology from her training, and the reasons why a victim might not be forthcoming in reporting domestic violence. Hershberger Deposition, 21:15-24; ER 1182.

Martinez made a credible report that Kyle had been violent, kept her in a hotel room, choked her, and ripped a phone out of the wall while they were staying in Dublin, California. Hershberger Deposition, 38:6-14; ER 1186. Nonetheless, Officer Hershberger felt that Martinez might be more comfortable speaking with a detective in a controlled environment about her reports of prior violence in Dublin. Hershberger Deposition, 21:22-22:6; 28:18-29:3; ER 1182, 1184. Officer Hershberger is unaware of whether Martinez's allegations were ever referred to the

Dublin Police Department. Hershberger Deposition, 29:10-12; ER 1184.

Officer Hershberger was aware of her duty under California Penal Code § 836(b) to notify a domestic violence victim of her citizen's arrest rights if she determined she could not make an arrest. Hershberger Deposition, 23:6-19; ER 1182. However, Officer Hershberger did not inform Martinez of her citizen arrest rights, because she claimed Martinez had not alleged any violence that occurred that evening, only prior violence that occurred in Dublin, California regarding which the investigation was still ongoing. Hershberger Deposition, 25:8-22; ER 1183.

At the time of this call for service the Clovis Police Department had a domestic violence information pamphlet to distribute to potential domestic violence victims. Hershberger Deposition, 18:4-9; ER 1181. Officer Hershberger had the option of giving Martinez a pamphlet, but she opted not to because the investigation was ongoing and Martinez stopped being cooperative. Hershberger Deposition, 26:1-11; ER 1183. Officer Hershberger did not give Martinez an information sheet because the nature of the call was to check the welfare and Martinez did not report any domestic violence that occurred that night. Hershberger Deposition, 18:9-17; 27:1-5; ER 1181, 1183.

Officer Hershberger also did not inform Martinez about possibly seeking a restraining order, again because there was no allegation of domestic violence that had

occurred that evening. Hershberger Deposition, 36:13-20; ER 1186. Officer Hershberger declined to inform Martinez about seeking a civil domestic violence restraining order because the investigation into the Dublin incident was pending, even though a civil restraining order would be based on the victim's allegations and not the officer's determinations. Hershberger Deposition, 36:13-37:11; ER 1186.

Officer Hershberger stated her approach to the call would have been different if Martinez had told her she had been a victim of recent domestic violence. Hershberger Deposition, 27:12-17; ER 1183. Additional investigation would have been done, and her report would have reflected the allegations of recent violence. Hershberger Deposition, 27:18-22; ER 1183. Martinez also would have received a domestic violence pamphlet informing her of her victim rights. Hershberger Deposition, 27:23-28:3; ER 1183.

Martinez's recollection of her contact with Officer Hershberger is very different. Martinez told Officer Hershberger that she was in fear of Kyle and that he had abused her in Dublin. Martinez Deposition, 252:20-253:12; ER 1126. In the middle of their interview, Officer Hershberger took a break and Kyle was permitted to come back to her vicinity, which scared her. Martinez Deposition, 253:13-254:6; ER 1126-1127. Before Officer Hershberger interrupted the interview, Martinez told her Kyle had pushed her down the stairs earlier that night. Martinez Deposition,

255:5-256:7, 315:4-24; ER 1127, 1142. After Officer Hershberger continued her interview with Kyle nearby, Martinez was frightened and recanted what she had said about Dublin by pretending to be drunk and saying she wanted to go inside. Martinez Deposition, 256:13-257:14; ER 1126-1127.

Martinez was never escorted away from Kyle, she was not given any informational materials, and she was not given the option of having Kyle arrested. Martinez Deposition, 257:24-258:18; ER 1127. Martinez was contacted telephonically the next day by a Clovis Police detective, but Kyle had scripted her responses by then and she did not tell the detective the truth. Martinez Deposition, 261:24-262:7; ER 1128-1129.

As a result of Martinez's staying with Kyle the night of May 2, 2013, she suffered more domestic violence and abuse after Officer Hershberger and the other officer left. Martinez Deposition, 259:4-29; ER 1128.

II. Kim and Connie Knew of Kyle's Continuing Abuse of Martinez

Martinez spoke with Connie numerous times about Kyle's abusing her, beginning in May 2013. Martinez Deposition, 52:4-54:7; 56:5-57:20; 58:9-17; 65:24-66:25. There are photos depicting visible injuries to Martinez from an incident with Kyle in May 2013. *See* ER 629-634. Martinez's daughter, Destiny Jamerson ("Destiny") also remembers a handful of occasions on which Kim and Connie

discussed Kyle's domestic violence with her mother. Destiny Jamerson Deposition, 24:3-25:4; ER 1155.

Available communications records confirm that Connie most particularly, but also Kim to a significant extent, contacted Martinez very regularly after Kyle's abuse began. Records show that the Penningtons contacted Martinez 174 times by phone during the months of March through September 2013. ER 635-876. Martinez recalls there were also a significant number of text messages between her and Connie, but her cell service provider, Sprint, does not retain text message detail records. ER 627.

In the fall of 2013, during the process of an attempt to retrieve some of her belongings from Connie, Martinez recorded a conversation in which Martinez told Connie she knew about Kyle's domestic violence. Martinez told Connie she was recording. Martinez Deposition, 46:6-49:2; 202:4-204:3; ER 1073, 1112-1113. Connie did not deny Martinez's assertion on the recording. Dkt. Nos. 78-2, 81; ER 877, 1061.³

III. June 3-4, 2013 Incident

Yambupah, an officer with the Sanger Police Department since 2010, was one of four officers who responded to a domestic violence call for service on the morning

³These and other media exhibits were lodged with the district court and should be included in the physical file transmitted to this Court.

of June 4, 2013. Yambupah Deposition, 5:1-6, 5:23-6:3; ER 1169. Officer Yambupah was the primary investigator on the call for service and wrote a police report. Yambupah Deposition, 6:9-10; ER 1169.

Officer Yambupah interviewed Martinez and Kyle. Yambupah Deposition, 7:6-10; ER 1169. Officer Yambupah noticed that Martinez had physical injuries consistent with domestic violence, and she determined that Kyle was the dominant aggressor. Yambupah Deposition, 7:24-8:14; ER 1169-1170.

However, Kyle was not arrested, because Officer Yambupah was ordered not to arrest him by her supervisor, Sgt. Fred Sanders.⁴ Yambupah Deposition, 8:14-20; ER 1170. Sgt. Sanders did not give any justification for his order, and Officer Yambupah did not understand it. Yambupah Deposition, 9:21-10:25; ER 1170. Based on her training and experience in domestic violence and California Penal Code § 836, Kyle's status as the dominant aggressor responsible for Martinez's injuries made an arrest mandatory. Yambupah Deposition, 9:14-23; ER 1170. Officer Yambupah believed that the combination of Martinez's injuries and Kyle's status as the dominant aggressor made an arrest mandatory even if Martinez did not want Kyle arrested. Yambupah Deposition, 13:2-21; ER 1171. But for Sgt. Sanders'

⁴It has been represented that Sgt. Sanders is presently an incompetent witness. ER 37. The best record of Sgt. Sanders' actions on June 4, 2013 therefore is the testimony of Officer Yambupah, recited above.

prohibition, Officer Yambupah would have arrested Kyle. Yambupah Deposition, 16:14-17; ER 1172. Officer Yambupah was unable to cite any good faith basis for Sgt. Sanders' decision. Yambupah Deposition, 19:1-11; ER 1172. Sgt. Sanders also gave Officer Yambupah an unrelated transport assignment immediately after this call for service that prevented her from writing a timely report of domestic violence, as required by law. Yambupah Deposition, 24;15-26:11; ER 1174; Cal. Penal Code § 13701. Officer Yambupah testified that it was regrettable that she was prevented from doing more to help Martinez. Yambupah Deposition, 30:9-15; ER 1175.

Not only did Kyle remain at large, but none of the officers on scene gave Martinez any information provided to domestic violence victims before they left, and Martinez also was not told about her right to request a citizen's arrest under California Penal Code § 836(b). Yambupah Deposition, 11:1-12:5; ER 1170-1171. Nor did the officers issue the required emergency protective order that would have prohibited further contact between Kyle and Martinez. Yambupah Deposition, 15:17-18; ER 1171.

Officer Yambupah got the impression Martinez was in fear of Kyle. Yambupah Deposition, 12:15-17; ER 1171. Officer Yambupah believed that there was a possibility that the violence would continue if Kyle was not arrested. Yambupah Deposition, 14:2-10; ER 1171. Officer Yambupah believed it was

important for Martinez's safety that Kyle be arrested Yambupah Deposition, 16:22-17:1; ER 1172. Officer Yambupah was trained that the risk to the safety of a domestic violence is at its greatest when she makes a report against her perpetrator. Yambupah Deposition, 20:11-17; ER 1173. Officer Yambupah also believed it was probable that Kyle had access to weapons. Yambupah Deposition, 20:18-21:1; ER 1173. Officer Yambupah also became aware during her investigation that Kyle was then on suspension from the Clovis Police Department in relation to other domestic violence allegations involving another female. Yambupah Deposition, 21:2-12; ER 1173. Based on Martinez's report, Kyle may have committed an offense that day as serious as attempted murder. Yambupah Deposition, 28:12-25; ER 1175.

Martinez recalls the June 4th incident differently, in the sense that she and Kyle were not separated during the investigation. Martinez Deposition, 289:3-290:21; ER 1135-1136. As a result, Martinez had to whisper her statement to Officer Yambupah. Martinez Deposition, 290:14-22; ER 1136. Sgt. Sanders mentioned that Kyle was in law enforcement and that they were not going to arrest Kyle and instead just turn the matter over to the Clovis Police Department. Martinez Deposition, 291:21-292:7; ER 1136. Officer Yambupah had previously stated that Kyle would be arrested. Martinez Deposition, 291:18-20; ER 1136.

After the Sanger officers left the scene, Kyle beat, raped, sodomized, and

threatened Martinez. Martinez Deposition, 295:21-296:5; ER 1137. Martinez has presented numerous photos of the injuries she sustained on June 4th as evidence. ER 887-912.

Police procedures experts Scott DeFoe and David Cropp both are of the opinion that the June 4, 2013 call for service was handled completely incorrectly and/or was contrary to how officers are trained to handle domestic violence calls. ER 1024-1027, 1049-1054.

IV. Aftermath of June 4, 2013 Incident and the Hatching of the Conspiracy

After Kyle was released from custody on bail following his arrest by Clovis police officer later on June 4, 2013, Kim and Connie came over to the Sanger residence he and Martinez cohabited, and they all discussed what had occurred and how to come up with an innocent story to explain Martinez's injuries. Martinez Deposition, 58:20-59:22; 63:17-64:17; 297:13-18; ER 1076, 1078, 1137. During this meeting, Kyle, with input from Connie and Kim, prepared a script containing the story Martinez was supposed to provide to law enforcement. Martinez Deposition, 90:8-19; 94:6-22; 133:5-10; ER 1084-1085, 1095. Due to pressure from Kyle, Kim and Connie, Martinez contacted law enforcement on June 4, 2013 and recanted her allegations from earlier that day. Dkt. No. 78-2, 81; ER 905, 1061 (media exhibit).

V. Concealing Kyle's Violation of a Criminal Protective Order

Kim and Connie helped conceal Martinez after a criminal protective order was in effect following Kyle's June 4, 2013 arrest. Martinez Deposition, 90:19-91:2; ER 1084. On at least one occasion when Martinez was in Kim's car, he instructed her to duck down when they were driving past law enforcement. Martinez Deposition, 95:16-96:1; 108:2-110:5; ER 1085-1086, 1089. Kim and Connie also requested during a July 4, 2013 gathering that Kyle have Martinez stay out of the front yard of the Sanger house so that police would not see her. Martinez Deposition, 97:24-98:10; ER 1086.

VI. Efforts to Prevent Martinez from Making Additional Police Reports

There also were concerted efforts to prevent Martinez from making additional reports to law enforcement. Connie would also advise Martinez to "be smart" and watch what she said so as not to get Kyle in trouble during this time period. Martinez Deposition, 91:8-12; ER 1084. Connie asked Martinez to text her if Kyle was being abusive, and Connie would typically respond by coming over to make sure the police were not called. Martinez Deposition, 170:5-17; ER 1104. Specifically, during a July 15, 2013 domestic violence incident, Martinez attempted to call 911 but was prevented by Kyle. Martinez Deposition, 111:15-21; ER 1089. Kyle then called Connie, who quickly came over and instructed Martinez not to call the police, and

stayed with Martinez to make sure she did not try to call again. Martinez Deposition, 111:21-115:3; 142:13-143:1; ER 1089-1090, 1097. Similarly, after an August 2013 incident in which Martinez's rehearsed testimony dissatisfied Kyle, he abused her, and Connie helped keep watch on Martinez to keep her from accessing her phone and calling the police. Martinez Deposition, 162:9-163:9; ER 1102. On another occasion in July or August when Kyle was trying to convince Martinez to lie on the stand, he gave her some pills that caused her to lose consciousness. Martinez Deposition, 91:13-21; 105:9-106:10; ER 1084, 1088. Kyle had Connie come over, and they tried to revive Martinez, but they did not call the ambulance. Destiny Jamerson Deposition, 43:14-44:21; ER 1159-1160.

VII. Efforts to Prevent Martinez from Testifying in Kyle's Criminal Case

There were also efforts to prevent Martinez from testifying truthfully in Kyle's criminal proceedings. Connie sent Martinez a text message asking her not to say anything harmful about Kyle before an August 26, 2013 hearing in the criminal case at which Martinez was supposed to indicate whether or not she was willing to testify. Martinez Deposition, 102:3-104:24; 162:9-163:25; ER 1087-1088, 1102. Specifically, the message reads as follows:

Be strong today and please don't say anything to destroy his career. You both have made mistakes and learned a lot from this but it needs to be over today if you have any respect for him. Just remember, even though

it's ben rough, he has always supported you and Des from the beginning and always will. Good luck sweetie.

ER 908. Kyle and Connie also spoke with Martinez personally during this period to dissuade her from testifying. Martinez Deposition, 163:10-19; 165:22-166:4; ER 1102-1103. Kyle and Connie advised Martinez to refuse to testify, or "take the Fifth" in criminal court. Martinez Deposition, 198:25-199:5; ER 1111. As a result of this pressure, Martinez invoked her privilege against self-incrimination and declined to testify at the preliminary hearing on September 3, 2013. Martinez Deposition, 163:10-19; 165:9-21; ER 628, 909 (media exhibit), 926, 1102-1103.

After Kyle's September 18, 2013 arrest and release from custody, he used Kim and Connie's house phone to call Connie's cell phone and communicate with Martinez and threaten her. Martinez Deposition, 157:9-158:20; ER 1101. Kyle was due back in court the next day, September 19, 2013. ER 628, 928. Connie assisted Kyle in this manner even though Martinez had visible injuries from being abused that day. Martinez Deposition, 158:21-159:1; ER 628, 996-1001, 1101.

In the fall of 2013, Kim and Kyle also prevented Martinez from personally moving her belongings when she left her condo in Clovis in late May 2013; her belongings were instead moved into a storage unit at a location unknown to her, under Kim's and Connie's names. Martinez Deposition, 144:13-145:7; ER 1098,

1113. Kim and Connie refused to allow Martinez to reclaim her things after she left Kyle, unless she agreed not to testify against him. Destiny Jamerson Deposition, 64:1-11; ER 1165. Martinez never recovered her furniture and other items. Destiny Jamerson Deposition, 64:1-11; 66:12-25, ER 1165.

VIII. Officer High's Involvement in September 2013

High, a Clovis Police Department Officer since 2006, was on restricted duty and was working in the front office of the records division in September 2013. High Deposition, 5:18-21; 11:13-24; ER 1189.

High's mobile phone number in September 2013 was (559) 907-1009. ER 1190. During her deposition, High was shown phone records indicating that she called Kyle on September 3, 2013 at 6:20 a.m. and spoke for approximately 30 minutes, and also spoke with him on September 7, 2013 at 3:23 a.m. High Deposition, 10:5-16; 15:25-16:9; ER 1190-1192. During her deposition, High could not fathom what she would have discussed with Kyle that early. High Deposition, 13:13-17; ER 1191. High and Kyle do not speak on the phone very frequently, so she testified that she would likely remember if she spoke with him at what she conceded was an "ungodly" hour. High Deposition, 16:25-17:7; ER 1192.

High could not recall what may have been discussed with Kyle on the occasions regarding which she was questioned, but she was adamant that she did not

speak with him at any time regarding anything to do with Martinez. High Deposition, 15:9-11; 26:3-27:16; ER 1191, 1194.

High has basic, intermediate and advanced POST certificates, and has had training related to domestic violence. High Deposition, 18:20-19:2; ER 1192. High is aware that confidential reports of domestic violence are supposed to remain confidential and not be disclosed to the alleged perpetrator. High Deposition, 19:3-7; ER 1192.

Martinez's testimony on this issue is diametrically opposed to High's. In August or September 2013, Kyle had a speaker phone conversation with High in which High disclosed her confidential reports to him and also disclosed that Officer Gary Taylor was the subject of a pending internal affairs investigation. Martinez Deposition, 307:3-310:17; ER 1140-1141. Martinez also recalls that in September she was subject to intense and frequent intimidation and abuse, culminating in a September 18, 2013 incident that resulted in Kyle's arrest. ER 994-995.

The certified phone records corroborate Martinez's account, as they confirm that there was telephone communication between Kyle and Officer High on September 3 and 7, 2013, consistent with the screen shot records obtained by Martinez. ER 1104-1108.

Police procedures experts DeFoe and Cropp are in agreement that the

disclosure of confidential victim reports to an alleged perpetrator is highly inappropriate and dangerous, and clearly contrary to prevailing police procedures. ER 1024, 1050-1052.

IX. Martinez's Damages

Martinez is very damaged as a result of the above-described abuse. While Martinez was living in Sanger in August 2013, she attempted suicide. Martinez Deposition, 148:10-149:24. Martinez has been diagnosed with PTSD and currently lives in a confidential location due to fear of reprisal. Martinez Deposition, 24:24-25:5; 335:5-20.

Martinez believes Kim and Connie are partly responsible for her damages related to Kyle's abuse. Martinez Deposition, 176:24-177:13. From Martinez's viewpoint, Kim and Connie were part of her abuse cycle, in that they helped conceal and perpetuate Kyle's abuse. Martinez Deposition, 141:1-7.

SUMMARY OF ARGUMENT

The district court's grant of qualified immunity to Yambupah, Sanders and Hershberger was unwarranted as to Martinez's substantive due process claim. The record shows these officers were all well aware that the arrest and ordered restraint of Kyle were readily justifiable, as probable cause existed that he had injured

Martinez through dominant aggression. These officers also knew that Kyle had committed serious offenses, as attempted murder on June 4, 2013, and that he would likely harm Martinez again if they acted with indifference to their law enforcement obligations and her request for service. Moreover, these officers had no legitimate reason for refusing to act, or for refusing to follow state law and inform Martinez of her rights as a domestic violence victim.

Under applicable law, the combination of these facts required these officers not to act in a way that they did not impair Martinez from being able to protect herself, create additional dangers through the disregard of their duties, or do damage to the special relationship they had with Martinez. Because it was clear that these facts supported a substantive due process violation prior to 2013, Yambupah, Sanders and Hershberger should not have been granted either qualified immunity or summary judgment. Indeed, the record showed that Martinez's substantive due process claim against these officers was just as strong as the one against High, as to whom summary judgment and qualified immunity were denied.

The district court also erred in dismissing Martinez's negligence claim against Kim and Connie. The denial of summary judgment as to the civil conspiracy claim against these two defendants showed that the record supported an inference that they committed misconduct, and the record also showed that Martinez was harmed as a

result. The record also shows that Kim and Connie were well aware of the ongoing abuse of Martinez by Kyle.

The district court nonetheless found that there was no duty owed by Kim and Connie to Martinez, but it is fundamental under state law that all persons have a duty to avoid causing foreseeable harm to others. The existence of this general and broad duty is the core of the concept of negligence. Negligence also does not have to be specifically pleaded, so Martinez was not obligated to particularize the underpinnings of the duty owed by Kim and Connie in her complaint. For all of these reasons, the grant of summary judgment in favor of Kim and Connie as to Martinez's negligence claim constitutes reversible error.

Reversal is thus warranted as to these claims, which should be reinstated and remanded for trial.

STANDARD OF REVIEW

I. Summary Judgment

As this Court stated in *Bravo v. City of Santa Maria*, 665 F.3d 1076 (9th Cir. 2011):

We review the district court's grant of summary judgment de novo. *Delia v. City of Rialto*, 621 F.3d 1069, 1074 (9th Cir. 2010). Viewing the evidence and drawing all inferences in the light most favorable to the

non-moving party, we must determine whether any genuine issues of material fact remain and whether the district court correctly applied the relevant substantive law. *Id.*; see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986). If a rational trier of fact could resolve a genuine issue of material fact in the nonmoving party's favor, the court "may not affirm a grant of summary judgment . . . because credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir. 2009) (internal quotation marks and alterations omitted).

Bravo, 665 F.3d at 1083.

ARGUMENT

I. Yambupah and Sanders Were Not Entitled to Qualified Immunity

The district court found that Yambupah and Sanders were entitled to qualified immunity regarding Martinez's substantive due process claim. ER 73-75. The district court acknowledged, however, that the question was a close and difficult one that would have to be resolved ultimately by this Court. ER 46-47, 71-72. For the reasons explained, this question should have been involved in Martinez's favor.

The district court recognized that prior analogous decisions existed, but it determined that they were not sufficiently similar. ER 52-53, 74-75. Martinez believes the district court construed the similarity aspect of qualified immunity more onerously than the law requires. "In determining whether an officer is entitled to qualified immunity, [courts] consider (1) whether there has been a violation of a

constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct." *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014) (citation omitted). A "clearly established" right "do[es] not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *see also Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017) (analogous precedent does not have to be on "all fours" with the matter at issue).

While "clearly established law" has to be particularized to the facts of the case, *White v. Pauly*, 137 S. Ct. 548, 552 (2017), the same factual scenario does not need to have played out previously; a prior analogous holding may provide a reasonable officer with sufficient notice of what the Constitution required. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (qualified immunity requires "clearly established statutory or constitutional rights of which a reasonable person would have known."); *Taylor v Barkes*, 135 S.Ct. 2042 (2017) (per curiam). The very action in question need not have been held unlawful already. *See Fogel v. Collins*, 531 F.3d 824, 833 (9th Cir. 2008) Thus, the "dispositive question" is "whether the violative nature of particular conduct is clearly established." *See, e.g., Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (*quoting al-Kidd*, 563 U.S. at 742). In determining whether

a question of law is clearly established, this Circuit considers not only its own precedent but any useful decisional authority. *Tarabochia v. Adkins*, 766 F.3d 1115, 1125 (9th Cir. 2014) (quoting *Boyd v. Benton Cty.*, 374 F.3d 773, 781 (9th Cir. 2004)).

As evidenced by its contrary ruling regarding High, ER 77-78, the district court recognized that in 2013 Martinez had a sufficiently clear and particular substantive due process right not to be subjected to deliberately indifferent law enforcement conduct creating or increasing her danger. Indeed, the district court stated that “it was clearly established that state officials could be held liable where they affirmatively and with deliberate indifference placed an individual in danger she would not otherwise have faced.” ER 52-53. This assessment finds support in several authorities, which were cited by the district court, and one of which arose specifically in the context of a domestic violence call for service. *See Okin v. Village of Cornwall*, 577 F.3d 415, 430 (2d Cir. 2009) (where officers openly expressed camaraderie with an abuser and relative contempt for his victim, they “could be viewed as ratcheting up the threat of danger to [her].”); *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 844 (9th Cir. 2010) (plaintiff “was placed in a worse situation by the actions and inactions of” the defendant officers.); *Kennedy v. Ridgefield City*, 439 F.3d 1055, 1063 (9th Cir. 2006) (defendants’ actions “created an opportunity for [the perpetrator]

to assault [the victim] that otherwise would not have existed.") (internal citation omitted).

The district court's distinguishing of what it deemed to be the most analogous case, *Okin v. Village of Cornwall*, is in conflict with the specifics of that decision, and its failure to recognize the important commonalities led to its grant of qualified immunity to Yambupah and Sanders. First, the district court characterized *Okin* as one involving officers who had a longstanding relationship with the domestic abuser. ER 40. However, *Okin* makes no mention of any longstanding relationship between the abuser and any of the officers – other than an uncorroborated and non-specific boast by the abuser himself. 577 F. 3d at 426. In fact, there was no evidence of any prior relationship between the abuser and any named defendant, or any involved police department official. *Id.* at 426, n.8. By contrast, it is undisputed here that Kyle's father, Kim, was a longtime employee of the Sanger Police Department, worked there at the time of the June 4, 2013 incident, and had known and/or worked with the officer in charge of the scene, Sanders, for at least 25 years. Deposition of Kim Pennington, 6:19-9:23; ER 1209-1210. There is also evidence that at least one of the officers who responded on June 4, 2013 knew the Penningtons, as evidenced by the reference to them on scene as "good people." Martinez Deposition, 88:14-18; ER 1084. Kyle also acknowledged he knew Sanders from growing up in Sanger.

Kyle Pennington Deposition, 47:4-10; ER 1228. If anything, there is greater evidence here of a longstanding connection between the officer defendants and the abuser than in *Okin*.

Second, the district court referred to defendant officers joking and laughing with the abuser in *Okin*. ER 71. However, *Okin* contains *absolutely no mention* of any officer's ever laughing and joking with the abuser. In connection with one call for service, for an unstated length of time, at least one officer mentioned football to the *Okin* abuser. *Id.* at 421. Moreover, the significance of that fact in *Okin* was not that it proved any friendship, but instead that it suggested to the abuser that he could continue his misconduct without repercussions. *Id.* at 430. Of course, that same message was communicated even more clearly to Kyle, a trained peace officer, when Sanders overruled Yambupah in his presence and announced that they were not going to arrest him, after which Kyle instructed Desiree to go return to their house and wait for him. Martinez Deposition, 291:7-292:13; ER 1136. The absence of repercussions was communicated more subtly in *Okin* than in this case, so there was no meaningful dissimilarity justifying a grant of qualified immunity to Yambupah and Sanders.

The final distinction noted by the district court was that there were repeated incidents in *Okin*, rather than just one in this case involving Yambupah and Sanders. ER 40, 58. It is certainly true that *Okin* involved 16 law enforcement responses

between December 2001 and March 2003. *Id.* at 420-425. However, a more careful reading of *Okin* shows that one of the defendants who violated the victim's due process rights, defendant Douglas, responded only one time, during the first call for service in December 2001. *Id.* at 420-421, 437. *Okin* therefore clearly did not turn on or require an officer to respond to repeated calls for service, and the opinion states as much:

The record demonstrates an escalating series of incidents that followed the officers' response to Okin's first complaint of domestic violence, where the officers openly expressed camaraderie with [the abuser] and contempt for [the victim]. The officers' conduct, both in response to that first complaint and thereafter, could be viewed as ratcheting up the threat of danger to [the victim]. [She] would be more vulnerable once [the abuser] was aware of the officers' dismissive and indifferent attitude toward [her] complaints, as such awareness nullifies the deterrent capacity of police response. The implied message of the officer's conduct may have galvanized [the abuser] to persist in violent encounters with [her]. A reasonable factfinder undoubtedly could conclude that defendants, by their affirmative conduct, enhanced the danger to [the victim] because they conveyed to [the abuser] that he could continue to engage in domestic violence with impunity, and that defendants thus violated Okin's due process rights.

Id. at 430-431. At least as to defendant Douglas, the officer who apparently discussed sports with the abuser in December 2001, *Okin's* pronouncement was not based on any repeated contact with abuser or victim, but a *response to a single call for service*, one that occurred when there was no prior history between the couple.

When reviewed more carefully, *Okin* is on all fours with this case, and the facts

involving the June 4, 2013 incident are even more egregious than the December 2001 incident that supported a liability finding in *Okin*. A comparison table illustrates this point:

<i>Okin</i> - December 23, 2001	<i>Martinez</i> - June 4, 2013
Victim called 911 three times after her abuser grabbed her neck and started to choke her. <i>Id.</i> at 420.	After a night of abuse, Martinez escaped from her and Kyle's shared residence and was pursued by him into the street, which resulted in a neighbor's 911 call. ER 1082-1084.
Victim showed Officer Douglas bruises on her leg that he claimed looked old, and she did not appear to have marks on her neck. <i>Id.</i>	Officer Yambupah noticed that Martinez had physical injuries consistent with domestic violence, and she determined that Kyle was the dominant aggressor. ER 1169-1170. Martinez presented numerous photos of the injuries she sustained on June 4th as evidence. ER 887-912.
Victim said her abuser had been hitting her every day. <i>Id.</i>	Based on Martinez's report, Kyle may have committed an offense that day as serious as attempted murder. ER 1175.
Victim relayed a statement to Officer Douglas indicating that her abuser told the Police Chief he could not help "smacking her around." <i>Id.</i>	Yambupah received information about Pennington's domestic violence history during her investigation on scene. ER 1173.
Officers received information from both victim and abuser suggesting she had a history of mental instability. <i>Id.</i> at 420-421.	Yambupah believed Martinez was highly intoxicated. ER 1181.

<p>Victim indicated a fear of continued violence. <i>Id.</i> at 421.</p>	<p>Officer Yambupah got the impression Martinez was in fear of Kyle. ER 1171. Officer Yambupah believed that there was a possibility that the violence would continue if Kyle was not arrested. ER 1171. Officer Yambupah believed it was important for Martinez's safety that Kyle be arrested. ER 1172. Officer Yambupah was trained that the risk to the safety of a domestic violence is at its greatest when she makes a report against her perpetrator. ER 1173. Officer Yambupah also believed it was probable that Kyle had access to weapons. ER 1173.</p>
<p>Victim was equivocal about filing charges. <i>Id.</i></p>	<p>Officer Yambupah believed that the combination of Martinez's injuries and Kyle's status as the dominant aggressor made an arrest mandatory even if Martinez did not want Kyle arrested. ER 1171. But for Sgt. Sanders' prohibition, Officer Yambupah would have arrested Kyle. ER 1172. Officer Yambupah was unable to cite any good faith basis for Sgt. Sanders' decision. ER 1172.</p>

Victim was given an incident report that detailed abuse, albeit incompletely, and counseling information. <i>Id.</i>	Yambupah was prevented from writing the legally required same-shift report, and Martinez never received any information typically given to domestic violence victims, such as information regarding available services, her citizen's arrest rights, an emergency protective order, civil restraining order information, or her right to be assisted by a domestic violence advocate. ER 995, 1170-1171.
Officers did not interview abuser about victim's injuries. <i>Id.</i>	Yambupah interviewed Kyle and found his statements to be incredible, which contributed to her belief that probable cause to arrest him existed. ER 1173-1174.
Officers were derogatory to victim when she indicated she wanted to press charges. <i>Id.</i>	While not derogatory with words, the officers ignored the pleas of a fearful, injured and credible victim and declined to arrest her abuser. Sgt. Sanders mentioned that Kyle was in law enforcement and that they were not going to arrest Kyle, in his presence. ER 1136. Officer Yambupah had previously stated that Kyle would be arrested. ER 1136.
No mention of continued abuse the same day of the police misconduct.	Martinez was physically and sexually abused after the officers cleared the scene, and she was also pressured by Kyle and his parents to recant her report. ER 627, 1076-1077, 1085, 1137.

This comparison shows very clearly that the district court's conclusion that Martinez's case was "not an *Okin* type of fact situation" (ER 40) was unfounded, and, accordingly, so was the grant of qualified immunity in favor of Yambupah and Sanders.

II. Hershberger Also Was Not Entitled to Qualified Immunity

The above exhaustive analysis of *Okin* shows that it was also not distinguishable so as to entitle Hershberger to qualified immunity. By Martinez's account, Officer Hershberger, a longtime co-worker of Kyle's, failed to do several things that reasonably trained officers do in domestic violence situations and as required by mandatory legal provisions. Specifically, Officer Hershberger failed to separate Kyle and Martinez, to ensure she was not subject to Kyle's influence in making her report. ER 1020, 1049-1050. Furthermore, Kyle should have been arrested, based on facts showing that he was the dominant aggressor in ongoing domestic violence that presented a serious risk of future harm. ER 1020-1022, 1049-1051. Additionally, Martinez should have received information regarding her right as a domestic violence victim, including the right to request a citizen's arrest if the officer determined they could not make an arrest, as well as information regarding civil restraining orders, access to shelters, access to victim services, and other safety measures and benefits. ER 1022-1025, 1053. As Martinez confirms in her

declaration, any and all of these measures likely would have ensured her safety and prevented the significant harm and trauma she endured. ER 994-995.

In the same way that *Okin* found that Officer Douglas' initial, one-time response emboldened her abuser, the same can be said for Hershberger's singular contact. Officer Hershberger's refusal to take a report, report domestic violence to the agency with primary jurisdiction (Dublin) or to advise Martinez of her rights is the very same misconduct denounced in *Okin*. See 577 F.3d 420-422. Qualified immunity was equally inappropriate as to Hershberger.

III. The Negligence Claim as to Kim and Connie Was Improperly Dismissed

The district court granted summary judgment as to Martinez's negligence claim because it found that Kim and Connie did not owe Martinez any duty. ER 24-26, 29-30. The district court made this determination even though it found that the record supported Martinez's civil conspiracy claim against them. ER 29. The district court also rejected Martinez's argument that any citizen would have a duty not to commit the misconduct the record suggests Kim and Connie did. ER 26.

The district court's ruling constitutes reversible error. Under California law, "[e]very person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights." California Civil Code § 1708. Moreover, under California Civil Code § 1714, "[e]veryone is

responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person.” These principles are the foundation of California negligence law. *See Rowland v. Christian*, 69 Cal.2d 108, 112 (1968).

It is also beyond peradventure that Martinez sustained the requisite damage to assert a claim for negligence under California Civil Code §§ 3281 and 3282. Martinez was beaten and injured repeatedly, drugged against her will and without her knowledge, sexually assaulted, and – as borne out by the denial of summary judgment on Martinez’s civil conspiracy claim – there is sufficient evidence that Kim and Connie helped cause these injuries. While civil conspiracy is more akin to an intentional tort, "there may be considerable overlap of intentional and negligent causes of action" *Central Pathology Service Medical Clinic, Inc. v. Superior Court*, 3 Cal.4th 181, 192 (1992).

The district court also wrongly focused on the sufficiency of the pleadings, ER 24-25, but the detailed factual allegations of Martinez’s lengthy Second Amended Complaint certainly satisfied contemporary pleading rules, which emphasize the sufficiency of factual rather than legal averments. *See Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). Moreover, negligence does not have to be pleaded with specificity. *See Federal Rule of Civil Procedure 8(a); AlliedSignal, Inc. v. City of Phoenix*, 182

F.3d 692, 696 (9th Cir. 1999). Martinez certainly alleged facts sufficient to show that Kim and Connie caused her harm, and that they also had a duty – like everyone else – not to do so. ER 186-197, 206.

Accordingly, Martinez’s negligence claim against Kim and Connie should be reinstated.

CONCLUSION

Based on the foregoing, and the record in the light most favoring Martinez, reversal is thus warranted, as requested above. This matter should be remanded for trial.

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION

Pursuant to Circuit Rule 32(a)(7), I certify that the opening brief is proportionately spaced, has a typeface of 14 points or more and contains 10,559 words.

Date: April 30, 2018

/s/ Kevin G. Little
Kevin G. Little

STATEMENT OF RELATED CASES

There are no cases related to the present case now before this Court.

Date: April 30, 2018

/s/ Kevin G. Little
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CERTIFICATION OF SERVICE

I HEREBY CERTIFY that this document has been served in accordance with the Federal Rules of Appellate Procedure and Local Rules of this Court to the counsel listed on the attached service list.

Date: April 30, 2018

/s/ Kevin G. Little
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CERTIFICATION OF SAMENESS

I HEREBY CERTIFY that the foregoing brief is identical to that which was filed electronically on April 30, 2018.

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