

PUBLISH

**UNITED STATES COURT OF
APPEALS
TENTH CIRCUIT**

JESSICA GONZALES, individually and

Jessica Gonzales brought this action under 42 U.S.C. § 1983 individually and on behalf of her deceased minor children against the City of Castle Rock, Colorado, and Castle Rock police officers Aaron Ahlfinger, R.S. Brink, and Marc Ruisi. Ms. Gonzales alleged that plaintiffs' substantive and procedural due process rights were violated when defendant police officers failed to enforce a restraining order against her estranged husband, Simon Gonzales, after he abducted the children. While Ms. Gonzales was

children were still gone. At that point, she went to Simon Gonzales' apartment and found that he had not returned. She called the police from the apartment complex and was told by the dispatcher to wait there until the police arrived. No officer ever came and at about 12:50 a.m. she went to the police station and met with Officer Ahlfinger. He took an incident report, but did not attempt to enforce the TRO or to locate the three children.

At approximately 3:20 a.m., Simon Gonzales drove to the Castle Rock Police Station, got out of his truck, and opened fire with a semi-automatic handgun he had purchased shortly after abducting his daughters. He was shot dead at the scene. The police discovered the three girls, who had been murdered by Simon earlier that evening, in the cab of his truck.

II

We turn first to Ms. Gonzales' claim that defendants violated plaintiffs' rights to substantive due process by failing to enforce the restraining order. The starting point for assessing this claim is the Supreme Court's discussion of the matter in *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189 (1989). There the plaintiff, a child abused by his father, sued social workers and their social services department alleging a substantive deprivation of his liberty interest occasioned by their failure to remove him from his father's custody despite knowledge of the abuse.

In support of her substantive due process claim, Ms. Gonzales points to the Colorado statute describing peace officers' duties with respect to the enforcement of such orders. As the Court indicated in *DeShaney*, however, while this statute is relevant to Ms. Gonzales' procedural due process claim, *see infra*, the language of the Due Process Clause itself must be the source of her substantive claim. *See DeShaney*, 489 U.S. at 195. In rejecting the substantive due process argument, the Court pointed out that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195.

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

To make out a proper danger creation claim, a plaintiff must demonstrate that (1) the charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendants' conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.

Currier v. Doran, 242 F.3d 905, 918 (10th Cir. 2001) (citing *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1262-63 (10th Cir. 1998)).

In order to satisfy the first requirement and show that the defendant created the danger or increased the plaintiff's vulnerability to it, a plaintiff must show affirmative conduct on the part of the defendant, *Graham*, 22 F.3d at 995, "that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been," *Armijo*, 159 F.3d at 1263 (quoting *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993)). If this element is not shown, the substantive due process claim must fail. In assessing this factor, it is important to distinguish between affirmative conduct that creates or enhances a danger and a failure to act that merely does not decrease or eliminate a pre-existing danger. This distinction, while subtle, is critical under *DeShaney* and its progeny.

Ms. Gonzales contends the circumstances here are analogous to those in *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001), in which we held that the plaintiff had set out the requisite affirmative conduct in support of his substantive due process claim. In *Currier*, however, we took great care to point out that "[t]he danger creation theory . . . focuses on the affirmative actions of the state in placing the plaintiff in harm's way." *Id.* at 919. We concluded there that a defendant social worker had acted affirmatively by recommending that a parent be given legal custody of a child despite the defendant's knowledge of

evidence and allegations that the parent had previously abused the child. While we observed that the defendant had also failed to investigate or act on the allegations of abuse, we noted that this failure to act “should be viewed in the general context of the state’s affirmative conduct in removing the children from their mother and placing the children with their father.” *Id.* at 920 n.7.

Although in the present case Ms. Gonzales attempts to characterize defendants’ conduct as affirmative interference with the protection provided by the restraining order, in the end the individual defendants simply failed to act by refusing to enforce the order. Their failure, while it did not reduce the danger posed by Simon Gonzales’ abduction of the girls, did not create or enhance that danger. This lack of affirmative conduct is fatal to Ms. Gonzales’ substantive due process claim. *See Graham*, 22 F.3d at 995 (substantive due process argument must fail when plaintiffs unable to “point to any affirmative actions by the defendants that created or increased the danger to the victims.”).

III

We reach a different result with respect to Ms. Gonzales’ procedural due process argument. This claim requires that we address an issue the Supreme Court did not reach in *DeShaney* because it was not timely raised – whether the state statute at issue gives “an ‘entitlement’ to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation under our decision in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).” *DeShaney*, 489 U.S. at 195 n.2.

In *Roth*, the Court pointed out that “[t]he Fourteenth Amendment’s procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests – property interests – may take many forms.” *Roth*, 408 U.S. at 576. Property interests “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as

state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Id.* at 577. “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Id.*

Guenther, 740 P.2d 971, 975 (Colo. 1987); *see also Allison v. Indus. Claim Appeals Office*, 884 P.2d 1113, 1119-20 (Colo. 1994); *Hernandez v. District Court*, 814 P.2d 379, 381 (Colo. 1991). Moreover, the legislative history of the statute at issue clearly indicates that the legislature intended to impose a mandatory obligation on the police as well as on others involved in the criminal justice system who deal with domestic abuse.

First of all, . . . the enti

The complaint in this case, viewed favorably to Ms. Gonzales, indicates that defendant police officers used no means, reasonable or otherwise, to enforce the restraining order. Under these circumstances, we conclude that Ms. Gonzales has effectively alleged a procedural due process claim with respect to her entitlement to enforcement of the order by every reasonable means.

The statute also imposes a duty on peace officers to *arrest* “when the peace officer has information amounting to probable cause” that the restrained person has violated or attempted to violate the restraining order. COLO. REV. STAT. § 18-6-803.5(3)(b)(2002). We do not agree with the district court that because the officer’s mandatory duty to arrest only arises upon the existence of facts giving rise to probable cause, no legitimate claim of entitlement can ever exist. In our view, the statute clearly creates a mandatory duty to arrest when probable cause is present. It follows that the holder of an order has a legitimate claim of entitlement to the protection provided by arrest when the officer has information amounting to probable cause that the order has been violated. The existence of probable cause is an objectively ascertainable matter evaluated on the basis of what a reasonably well-trained officer would know. *See Malley v. Briggs*, 475 U.S. 335, 345 (1986); *United States v. Davis*, 197 F.3d 1048, 1051 (10th Cir. 1999). It therefore is not a matter committed to the officer’s subjective discretion. *See Nearing v. Weaver*, 670 P.2d 137, 142 & n.7 (Ore. 1983) (duty to arrest domestic order violator not discretionary despite requirement that arrest be supported by probable cause); *Campbell v. Campbell*, 682 A.2d 272, 274-75 (N.J. Super. Ct. Law Div. 1996) (same).

substantive outcome rather than merely referring to procedures. *See, e.g., Doe v. Milwaukee County*, 903 F.3d 499, 502-04 (7th Cir. 1990); *cf. Doyle v. Okla. Bar Ass'n*, 998 F.2d 1559, 1570 (10th Cir. 1993) (same re liberty interest). Here, however, the statute mandates not merely a procedure, but a specific outcome, enforcement of a restraining order.

Our review of the complaint in the light most favorable to Ms. Gonzales reveals that she has stated a procedural due process claim with respect to her entitlement to have Simon Gonzales arrested. She alleged that under the restraining order, Simon Gonzales was entitled to a mid-week dinner visit only upon reasonable notice and arrangement between the parties, and that no notice or arrangement had preceded his abduction of the children. She alleged that she showed defendant officers the order and told them that Simon had taken the children in violation of its provisions. These allegations, along with the invocation of the state statute defining the duties of peace officers with respect to the violation of protective orders, set out a constitutional deprivation sufficient to withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

Accordingly, we reverse the district court's decision that Ms Gonzales has failed to state a claim and remand for further proceedings in light of this opinion.² The City's argument that Ms. Gonzales could not establish municipal liability and the individual defendants' contention that they are entitled to qualified immunity are matters to be considered in the first instance