

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

UNITED STATES COURTS  
SOUTHERN DISTRICT OF TEXAS  
CLERK

SEP 07 1999 EC

CLAUDIA NAVARRO PINEDA, et al. §  
*Plaintiffs* §  
§  
vs. §  
§  
THE CITY OF HOUSTON, et al. §  
*Defendants* §

MICHAEL N. MILBY, CLERK OF COURT  
Civil Action: H:98-3877

---

**PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO  
PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION OF  
QUALIFIED IMMUNITY RULING**

---

TO THE HONORABLE SIM LAKE, UNITED STATES DISTRICT JUDGE:

Plaintiffs respectfully file this reply to the Defendants' response to Plaintiffs' motion for partial reconsideration of this Court's ruling on the Texas Wrongful Death Act claims.

**Nature and Stage of the Proceeding**

This is a civil rights action arising out of the shooting of Pedro Oregon Navarro. On July 29, 1999, this Court granted in part and denied in part the individual Defendants' motions to dismiss and motions for summary judgment on the basis of qualified immunity. Plaintiffs moved the Court to reconsider its dismissal of the Texas Wrongful Death Act claims against Defendants Strouse, Willis, Tillery, and Perkins. Defendants responded, and Plaintiffs now reply in support of the motion for partial reconsideration.

101

## Argument

Defendants raise two arguments in response to the motion for reconsideration. First, they argue Plaintiffs' authorities do not address their qualified immunity defense. Second, they contend the actions of Pedro Oregon—and in the case of Sergeant Strouse, the other defendants—were intervening and superseding causes of Mr. Oregon's death. Both arguments are misplaced.

### **I. The Issue Is Causation, Not Qualified Immunity.**

Defendants seem to believe that the Court's order granting them qualified immunity on the excessive force claims excuses all liability under the Texas Wrongful Death Act. But Defendants have confused the issue of qualified immunity with the issue of causation.

This Court correctly ruled that the Defendants are not entitled to qualified immunity for their warrantless entry and search. Plaintiffs' motion for partial reconsideration simply points out that Defendants are liable for all damages proximately caused by that offense. That is not an issue of federal law under the qualified immunity doctrine; it is an issue of Texas law under the Texas Wrongful Death Act.

Consequently, Defendants miss the point when they argue that the authorities cited in the motion do not discuss qualified immunity. Qualified immunity is not the issue; Texas law on causation is the issue. As the authorities cited in the motion demonstrate, Defendants are liable under the Texas Wrongful Death Act for all damages proximately caused by their actions, including the death of Pedro Oregon.

Similarly, Defendant Strouse misses the point when he urges the Court to consider the "moment of arrest." Strouse contends that, because he did not directly participate in the "arrest" of Pedro Oregon, he cannot be held liable under the Wrongful Death Act. This is no different from Strouse's previous argument that he did not use excessive force. While that may be sufficient to excuse Strouse from liability on the excessive force claims, it begs the question with respect to the warrantless entry and search. Under Texas law, Strouse is liable for all damages proximately caused by his warrantless entry and search, including the death of Pedro Oregon.

This causation standard under Texas law is no different than the standard that will be applied to Plaintiffs' Section 1983 claims. Defendants are liable under Section 1983 for all damages proximately caused by their conduct. *Monroe v. Pape*, 365 U.S. 167, 187, 81 S. Ct. 473, 484 (1961) (Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions"); *accord Malley v. Briggs*, 475 U.S. 335, 344 n.7, 106 S. Ct. 1092, 1098 n.7 (1986). Therefore, federal courts routinely hold officers liable for damages caused indirectly, but proximately, by their wrongful conduct. "The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Springer v. Seaman*, 821 F.2d 871, 879 (1st Cir. 1987).

Indeed, federal courts have held police officers liable under facts very similar to the present case. *E.g.*, *Melear v. Spears*, 862 F.2d 1177, 1186 (5th Cir. 1989) (police officer liable for damages caused by other officers during an illegal search because he was "a full, active participant in the search, not a mere bystander," who "performed police functions that were integral to the search"); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989) ("It was eminently foreseeable that an encounter with a civilian by four policemen with weapons drawn and ready to fire might result in a discharge of the firearms and an injury to the civilian. No matter whose bullet ultimately inflicted plaintiff's injury, the deprivation of [plaintiff's] constitutional rights was the result of a team effort."). Thus, because the Defendants all participated in the wrongful entry and search of the apartment, they are all liable under Section 1983 for all damages caused by that search.

Because Defendants did not move for summary judgment on a causation ground, this Court's July 29, 1999 order did not address the damages available under Section 1983 for the Defendants' warrantless entry and search. Similarly, the Court should not have disposed of Plaintiffs' wrongful death claims on a causation ground that was never raised. The only issue Defendants raised was qualified immunity, and they still have not grappled with the causation principles of the Wrongful Death Act. Plaintiffs' wrongful death claims should not be extinguished on a causation argument that was never raised in the motions, and which is contrary to Texas law. Accordingly, the Court should reconsider its ruling and reinstate the Texas Wrongful Death Act claims.

## II. Defendants' Causation Arguments Present Fact Issues for the Jury.

Recognizing the direct causal chain between their warrantless entry and the death of Pedro Oregon, Defendants attempt to break the causal chain by arguing that Mr. Oregon pointed a weapon at the officers, and that this act was the "intervening cause" of his death. This is a new argument—it was not raised in Defendants' motions for summary judgment, and it underscores the point that Defendants never contested causation.

Defendants' argument depends on a factual premise this Court has already rejected: there is a material factual dispute regarding whether Mr. Oregon even raised a weapon, and if he did so, whether he was using force in self-defense against unannounced intruders. *See* July 29 Order at 41-44. Because the factual premise of this argument is disputed, Defendants are not entitled to summary judgment on the ground that Mr. Oregon's actions were a superseding or intervening cause of his own death. *See El Chico Corp. v. Poole*, 732 S.W.2d 306, 314 (Tex. 1987) (intervening cause is ordinarily an issue for the jury); *Rodriguez v. Moerbe*, 963 S.W.2d 808, 821 (Tex. App.—San Antonio 1998, pet.denied) ("New and independent cause is generally a question for the finder of fact.").

Moreover, even if Mr. Oregon did have a gun, that does not mean his acts were an intervening or superseding cause absolving Defendants of all liability, as a matter of law. There may be more than one proximate cause, and all persons whose actions proximately contribute to an injury are liable for it. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992); *Hall v. Huff*, 957 S.W.2d 90, 97 (Tex. App.—Texarkana 1997, pet. denied)

("[A]s a general rule of concurrent causation, all actors whose negligent actions or inactions contribute to the injury, proximately causing the injury, are liable"). Therefore, even if Mr. Oregon's actions contributed to his death, Defendants remain liable for his wrongful death because their warrantless entry and search set in motion the chain of events that proximately caused his death.<sup>1</sup>

Furthermore, even if Mr. Oregon did raise a gun in self-defense to protect himself from unannounced intruders kicking in his locked bedroom door in the middle of the night, it should have been foreseeable to the officers that he would do so. When an intervening cause is foreseeable, "it does not negate the continuing proximate causation and consequent liability of the initial actor." *Id.*; *see also Van v. Peña*, 990 S.W.2d 751, 754 (Tex. 1999) ("to be a superseding cause, the intervening force must not be ordinarily or reasonably foreseeable."). Therefore, because there is a fact issue regarding whether the Defendants announced themselves as police officers, Mr. Oregon's reasonably foreseeable effort to protect himself cannot be a superseding cause of his own death, as a matter of law.

In effect, Defendants ask this Court to hold—as a matter of law—that Mr. Oregon was the sole proximate cause of his own death. That proposition is contrary to the facts, and it ignores the modern rules of comparative causation. Under similar circumstances,

---

<sup>1</sup> Likewise, although Defendant Strouse argues that the actions of the other defendants were intervening causes that broke the chain of causation, his own actions in supervising and ordering the warrantless entry and search proximately caused the death of Pedro Oregon. Thus, summary judgment is not proper on this ground, either.

the Texas Supreme Court has refused to create such a special exception for police officers, explaining that "there is no special statutory provision excepting police officers from the recited legal standards for proximate cause. Police officers must balance the risk to the public with their duty to enforce the law to choose an appropriate course of conduct. Public safety should not be thrown to the winds in the heat of the chase." *Travis*, 830 S.W.2d at 98. This case is no different.

Defendant Strouse concedes this Court has found material fact issues regarding the officers' warrantless entry and search of the apartment, but insists "it does not follow that unlawful entry causes per se liability for every act after the entry." Strouse Resp. at 5. That is not Plaintiffs' position. Plaintiffs simply contend, under the Wrongful Death Act, that the defendants are liable for all damages proximately caused by the warrantless entry and search—including the death of Pedro Oregon.

### **III. Plaintiffs' Wrongful Death Claims Are Cognizable Under Texas Law.**

Finally, Defendant Strouse argues—for the first time—that Plaintiffs' claims are not cognizable under the Texas Tort Claims Act. Frankly, we don't understand this argument. Plaintiffs have not alleged negligence against Strouse—he is charged with intentional torts. Furthermore, as an individual defendant, Strouse is not protected by the Tort Claims Act. The Texas Wrongful Death Act provides a cause of action against anyone who wrongfully causes the death of another. *See* TEX. CIV. PRAC. & REM. CODE § 71.002 (Vernon 1997). Police officers are no exception.

**Prayer**

Plaintiffs respectfully pray that this Court reconsider its qualified immunity ruling, deny the motions of Defendants Willis, Tillery, Strouse, and Perkins for official immunity under the Texas Wrongful Death Act, and grant the Plaintiffs all other relief to which they may be entitled.

By: Paul Nugent by Day

Paul C. Nugent  
State Bar No. 15132600

David B. Gerger  
State Bar No. 07816360  
Mike Degeurin  
State Bar No. 05637500  
FOREMAN, DEGEURIN,  
NUGENT & GERGER  
909 Fannin, Suite 590  
Houston, Texas 77010  
Telephone: (713) 655-9000  
Facsimile: (713) 655-1812

ATTORNEYS FOR PLAINTIFFS

Respectfully submitted,

By: Richard Warren Mithoff

Richard Warren Mithoff  
State Bar No. 14228500  
Attorney-in-Charge

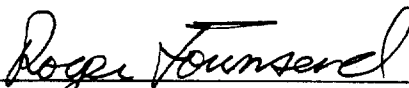
Michael L. Phifer  
State Bar No. 15908700  
MITHOFF & JACKS, L.L.P.  
One Allen Center  
500 Dallas, Suite 3450  
Houston, Texas 77002  
Telephone: (713) 654-1122  
Facsimile: (713) 739-8085

Roger Townsend  
Roger Townsend  
State Bar No. 20167600

Jennifer Bruch Hogan  
State Bar No. 03239100  
Richard P. Hogan, Jr.  
State Bar No. 09802010  
Russell S. Post  
State Bar No. 00797258  
HOGAN DUBOSE  
& TOWNSEND, L.L.P.  
1400 Lyric Centre  
440 Louisiana Street  
Houston, Texas 77002-1635  
Telephone: (713) 222-8800  
Facsimile: (713) 222-8810

## CERTIFICATE OF SERVICE

I served a copy of this document on counsel of record by certified mail return receipt requested and in accordance with Federal Rules of Civil Procedure.

  
Roger Townsend

Date: September 7, 1999

Counsel of Record for Defendant,  
The City of Houston:

Anthony W. Hall, Jr.  
City Attorney  
Robert L. Cambrice  
Senior City Attorney  
Attorney-In-Charge  
Kelly A. Dempsey  
Assistant City Attorney  
Elizabeth Ferrell  
Assistant City Attorney  
Jacqueline I. Leguizamon  
Assistant City Attorney  
900 Bagby, 4th Floor  
P. O. Box 1562  
Houston, Texas 77251

Counsel of Record for Defendant,  
Darrell H. Strouse:

Fred A. Keys, Jr.  
3401 Louisiana, Suite 270  
Houston, Texas 77002

Counsel of Record for Defendant,  
D. R. Perkins:

Duncan Neblett, III  
5 Greenway Plaza, Suite 1710  
Houston, Texas 77046

Counsel of Record for Defendants, D. R.  
Barrera, P. A. Herrada, L. E. Tillery,  
and James R. Willis:

Robert J. Thomas  
Assistant General Counsel  
Houston Police Officers' Union  
Office of Legal Counsel  
1818 North Memorial Way, Suite 201  
Houston, Texas 77007