

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

FILED
JAN 27 1999
U.S. DISTRICT COURT OF TEXAS
HOUSTON

JAN 27 1999 EE

CLAUDIA NAVARRO PINEDA, *et al.*,
Plaintiffs,

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MICHAEL N. MILEY, CLERK OF COURT

v.

Civil Action No. H-98-3877
JURY DEMANDED

CITY OF HOUSTON, *et al.*,
Defendants.

**REPLY OF DEFENDANT, CITY OF HOUSTON, TO THE RESPONSE
OF PLAINTIFFS TO THE MOTION FOR MORE DEFINITE STATEMENT**

Defendant, City of Houston, files its reply to the response of plaintiffs to the motion for more definite statement filed by the City:

1. The City of Houston contests the standing of the plaintiffs to bring suit because plaintiffs have failed to plead the legal names of two of the plaintiffs who are allegedly the minor children of Pedro Oregon Navarro. They contend that merely revealing the legal identities of these alleged plaintiffs during the discovery process is sufficient.

2. Rule 10 (a) of the Federal Rules of Civil Procedure requires that parties to an action be identified by name. *See Coe v. U.S. Dist. Court*, 676 F.2 411, 415 (10th Cir. 1982) (Every pleading must contain the names of parties thereto, if such are known and there are no provisions for anonymous plaintiffs.). Indeed, the Federal Rules of Civil Procedure makes no provision for plaintiffs to proceed anonymously. *Southern Methodist Univ. Ass'n v. Wynne & Jaffe*, 599 F.2d 707, 712-13 (5th Cir. 1979).

3. For survival actions brought pursuant to section 1983 of title 42 of the United States Code, courts look to the survival statute of the forum state. *Davis v. Oregon State Univ.*, 591 F.2d 493 (9th Cir. 1978). Capacity to sue is a jurisdictional issue. *See Ford Motor Co. v. Cammack*, No.

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14-95-01505-CV, slip op. at 2 (Tex. App.--Houston [14th Dist.] Sept. 3, 1998, no writ). Texas law requires that plaintiffs establish their standing to bring suit. Under Texas common law, an individual's action for personal injury did not survive his death. *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 345 (Tex. 1992). "For an heir to have standing to bring a survival action within the period allowed for administration of an estate, the heir must generally plead and prove that no administration of the decedent's estate is pending and that none is necessary." *Stewart v. Hardie*, 978 S.W.2d 203, 206 (Tex. App.--Fort Worth 1998, writ requested), citing *Frazier v. Wynn*, 472 S.W.2d 750, 752 (Tex. 1971). Without pleading the jurisdictional facts necessary for plaintiffs to establish who represents the estate of Pedro Oregon Navarro, that claim should be barred. *Cammack*, slip op. at 3. Because plaintiffs have failed to plead that no administration of the decedent's estate is pending and that none is necessary, they have failed to meet all the conditions precedent to bring a suit under the survival statute. *See* FED. R. CIV. P. 9 (c). Plaintiffs fail to plead such facts and the City asks this Court to order plaintiffs to replead, or alternatively, dismiss that portion of the cause of action for failure to state a claim under the survival statute.

4. Under Texas law, only the deceased's surviving spouse, children, and parents may bring an action to recover damages for wrongful death. TEX. CIV. PRAC. & REM. CODE ANN. § 71.004 (a) (Vernon 1997). Plaintiffs have not pleaded sufficient facts to show that plaintiffs have met the requirements to bring a wrongful death claim, whether they are the spouse, children, or parents of Pedro Oregon Navarro, or if there are other statutory beneficiaries. *See Shepard v. Ledford*, 962 S.W.2d 28, 31 (Tex. 1998); *Brown v. Edwards Transfer Co.*, 764 S.W.2d 220, 223 (Tex. 1988); *Garza v. Maverick Market, Inc.*, 768 S.W.2d 273, 275-76 (Tex. 1989). Plaintiffs' original complaint is silent as to whether the deceased, Pedro Oregon Navarro, was married at the

time of his death, whether he had ever been married, or who his heirs at law are. Plaintiffs' own pleadings raise these questions. They allege two different mothers for two different alleged children. Plaintiffs' own pleading raise standing question. Plaintiffs must affirmatively plead the bases of their standing to bring wrongful death and survival actions. Beneficiaries under the Texas Wrongful Death Statute and the Texas Survival Statute were created by statute. Plaintiffs are required to **plead** and prove how they can proceed under these statutes. *Brown*, 764 S.W.2d at 221-23; *Garza*, 768 S.W.2d at 275-76; *Sheppard*, 962 S.W.2d at 31-32. Without pleading such facts, plaintiffs have failed to state a claim upon which they may be granted relief.

PRAYER

For these reasons, defendant, City of Houston, requests this Court to require that plaintiffs plead with specificity the identities of the plaintiffs, and the bases for the capacities, or alternatively to dismiss their cause of action for failure to state a claim, and award defendant, City of Houston, all other relief to which it is entitled.