

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON

JAN 27 1999 EE

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

MICHAEL N. MILBY, CLERK OF COURT

Civil Action No. H-98-3877
JURY DEMANDED

**REPLY OF DEFENDANT, CITY OF HOUSTON, TO THE
RESPONSE OF PLAINTIFFS TO THE MOTION TO DISMISS**

Defendant, City of Houston, files its reply to the response of plaintiffs to the motion to dismiss filed by the City:

Use of Sworn Statement

1. Defendant, City of Houston, objects to plaintiffs' use of evidence in their response to the City's motion to dismiss. Matters outside the pleadings, such as affidavits, are not to be considered in the disposition of a motion to dismiss unless all parties have been given reasonable opportunity to present all pertinent material and the motion to dismiss is converted to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. FED. R. CIV. P. 12 (b). Plaintiffs' inclusion and reliance on the sworn statement, of which the City had no notice or opportunity to cross-examine, is improper.

2. Although plaintiffs have conveniently not referred to the testimony of David Perkins as a deposition, that testimony is in fact a pre-Rule 26 (f) meeting deposition of which the City had no notice and in which the City had no opportunity to participate. A deposition is the oral examination of any person taken before and recorded by an officer authorized to administer oaths

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which proceeds with examination and cross-examination as permitted under a trial. FED. R. CIV. P. 28 and 30. The sworn statement given by defendant Perkins, although not nominated a deposition, is in fact a deposition because it was testimony given under oath which included examination and cross-examination. Because the City did not have reasonable notice of this testimony and could not be represented, the City asks this Court to disregard this statement. *See* FED. R. CIV. P. 32 (a). Furthermore, pursuant to rule 12 (f) of the Federal Rules of Civil Procedure, the City asks this Court to strike the sworn statement of defendant Perkins.

Section 1983

3. In order to hold a municipality liable under section 1983, plaintiffs must show both culpability and causation. *Board of County Comm'rs v. Brown*, --- U.S. ---, ---, 117 S. Ct. 1382, 1388 (1997); *Snyder v. Trepagnier*, 142 F.3d 791, 795 (5th Cir. 1998).

4. Plaintiffs allege that the individual defendants were hired because the City used inadequate recruiting and screening processes. Interestingly, plaintiffs have never pleaded that these individual officers were not qualified to be certified Texas peace officers. The Supreme Court, in *Brown*, stated that in “layman’s terms, inadequate screening of an applicant’s record may reflect ‘indifference’ to the applicant’s background. For purposes of a legal inquiry into municipal liability under § 1983, however, that is not the *relevant* ‘indifference.’ A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision.” *Brown*, --- U.S. at ---; 117 S. Ct. at 1391. Plaintiffs have not suggested that the City hired the individual defendants with a conscious disregard for a high risk that they would use excessive force in violation of the civil rights of plaintiffs, or that they could not comprehend basic Fourth Amendment concepts, such as probable cause, and thus, the

City cannot be liable. *Brown*, --- U.S. at ---; 117 S. Ct. at 1394. To impose liability on the City for negligent screening and hiring would be to impose respondeat superior liability on the City. In addition, negligence cannot form the basis of recovery from a municipality under section 1983 cause of action. *Daniels v. Williams*, 474 U.S. 327 (1986).

5. Although plaintiffs also claim a civil rights violation based on a failure to train, they have not suggested the existence of “a pattern of tortious conduct by inadequately trained employees [to] show that the lack of proper training, rather than a one-time negligent administration of the programs or factors particular to the officer involved in a particular incident, is the ‘moving force’ behind the plaintiff’s injury. *Brown*, --- U.S. at ---, 117 S. Ct. at 1390. “Where a claim of municipal liability rests on a single decision, not itself representing a violation of federal law and not directing such a violation, the danger that a municipality will be held liable without fault is high.” *Brown*, --- U.S. at ---, 117 S. Ct. at 1390.

6. Plaintiffs allege that less stringent standards for members of the gang task force are the proximate cause of their injuries in their original complaint.

7. Plaintiffs have simply made conclusory allegations that less stringent standards for members of the gang task force, as opposed to other Houston Police Department specialized units, was a custom or practice which led to the incident in question. They do not allege that these officers were poorly trained or unqualified for the tasks to which they were assigned as required by *City of Canton v. Harris*, --- U.S. ---, --- 109 S. Ct. 1197, 1206 (1989). Plaintiffs’ repeated use of the term “less stringent standards” is an effort to extend *City of Canton*, *Brown*, and the Fifth Circuit’s ruling in *Snyder* from what is sufficient to what some expert would call superior. In *City of Canton*, --- U.S. at ---, 109 S. Ct. at 106, the Supreme Court takes great pains to eradicate this argument as a

basis for municipal liability under section 1983. In addition, plaintiffs do not allege that these officers were not trained in basic Fourth Amendment law or that they were not trained in the use of firearms, both of which are germane to this lawsuit.

PRAYER

For these reasons, defendant, City of Houston, requests this Court enter judgment that plaintiffs, Claudia Navarro Pineda, individually and as representative of the estate of Pedro Oregon Navarro, Ana Isabel Lores, as next friend of Ashley, minor daughter of Pedro Oregon Navarro, Blanca Lidia Viera, as next friend of Belinda, minor daughter of Pedro Oregon Navarro, Rogelio Oregon Navarro, Salvador Lopez, and Nelly Mejia, take nothing from defendant, City of Houston, dismiss plaintiffs' suit with prejudice, and award defendant, City of Houston, all other relief to which it is entitled.