

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED

JUN 07 1999

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MICHAEL N. MILBY, CLERK OF COURT

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, §

Plaintiffs §

v. §

CITY OF HOUSTON; D. H. STROUSE; §
D. R. BARRERA; P. A. HERRADA; §
D. R. PERKINS; L. E. TILLERY; §
JAMES R. WILLIS §

Defendants. §

CIVIL ACTION NO. H-98-3877
JURY

**Reply to Plaintiffs' Response to
Defendants, D. R. Barrera, P. A. Herrada, L. E. Tillery, and
James R. Willis, Motion for Partial Summary Judgment
Based Upon Qualified Immunity Regarding the Claim for the
Wrongful Death of Pedro Oregon Navarro**

Defendants, D. R. Barrera, P. A. Herrada, L. E. Tillery, and James R. Willis, file this brief
reply to plaintiffs response.

Controlling Authority

1. In March 1995, the Fifth Circuit, in an *en banc* opinion, published the controlling
authority regarding the heightened pleadings requirement in response to the affirmative defense of
qualified immunity. *Schultea v. Wood*, 47 F. 3d 1427 (5th Circuit 1995)

HCO

“The district court need not allow any discovery unless it finds that plaintiff has supported his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendants’ conduct at the time of the alleged acts”. *Id.* at 1434.

“We do not abandon the insistence in *Elliott v. Perez* that a complaint must do more than allege conclusions”. *Id.* At 1434 **“Rather, we embrace it. . .”**

2. It has been clearly established law since 1987 when the U. S. Supreme Court published the authority in *Anderson v. Creighton*, 483 U.S. 635, at 646 n.6, 107 S.Ct. 3034, 97 L. Ed. 2d 523 (1987) in which the court “emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation. . .”. *Schultea* at 1432

3. Four years later, the U.S. Supreme Court in *Seigert v. Gilley*, 500 U.S. 226, at 363, 111 S.Ct. 1789, 114 L. Ed. 2d 277 (1991) significantly **“instructed that until this threshold question was answered, no discovery should be had.”** *Schultea* at 1432.

Heightened Pleadings

“[t]he heightened pleadings standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56. *But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.”* Schultea at 1432; Seigert at 236 (Kennedy, J. concurring)

4. The plaintiffs are requesting additional time to take further discovery and are requesting a continuance of the motions pending their request for further discovery.

5. The defendants strongly object to any continuance of these motions pending further discovery. The plaintiffs have had ample opportunity to review the quite extensive investigations by

the co-defendant City of Houston and cannot produce any factual witnesses to give credible evidence in support of the plaintiffs' response to the defendants' motion for qualified immunity.

5. The plaintiff, Rogelio Oregon Navarro, submitted a contemporaneous sworn affidavit in which he admitted that he did not know who was shooting and did not see anyone shoot a weapon, nor did he see anyone shot in his apartment. (Please see Exhibit "15" to the defendants' original motion for qualified immunity.)

6. The plaintiff, Salvador Lopez, also gave a contemporaneous sworn affidavit in which he admitted that he did not know that anyone had been shot in the apartment and he did not see the shooting, nor did he know who had been shot in his apartment. (Please see Exhibit "16" to the defendants' original motion for qualified immunity.)

7. The plaintiff, Nelly Mejia, also gave a contemporaneous sworn affidavit on the morning of the shooting and she stated that she did not witness the shooting. (Please see Exhibit "17" to the defendants' original motion for qualified immunity.)

Conclusion

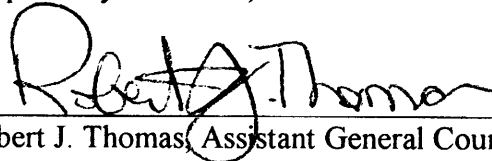
8. There is no justification for granting a continuance regarding the defendants' motion for qualified immunity. All of the witnesses to this tragic shooting previously submitted contemporaneous affidavits on the date of the shooting which have been tendered to the court as an exhibit to the defendants' original motion for qualified immunity. There are no other fact witnesses. The issue of qualified immunity is a threshold issue which must be resolved at the beginning of the litigation. One of the very purposes for the official immunity doctrine is the avoidance of disruptive discovery. These four defendants are currently facing a federal criminal grand jury investigation. As the controlling authority in the Fifth Circuit mandates, it is not a correct response by the plaintiffs'

nine (9) attorneys to plead that the plaintiffs have not yet had the opportunity to engage in discovery. The substantive defense of immunity controls as the heightened pleading standard is a departure from the usual pleading requirements of the Federal Rules of Civil Procedure 8 and 9(b).

H. Prayer

9. For these reasons, Defendants, D. R. Barrera, P. A. Herrada, L. E. Tillery, and James R. Willis, petition the court to grant a partial summary judgment based upon qualified immunity against plaintiffs, Claudia Navarro Pineda, mother of Pedro Oregon Navarro; Susana Oregon Navarro 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; regarding the claim for the wrongful death of Pedro Oregon Navarro as articulated in the Plaintiffs' First Amended Complaint (Docket No. 41), in their first claim for relief, paragraphs 31-44, 50.

Respectfully submitted,



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CERTIFICATE OF SERVICE

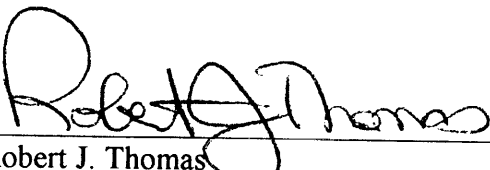
I hereby certify that a true and correct copy of the foregoing Reply to Plaintiffs' Response to Defendants D. R. Barrera, P. A. Herrada, L. E. Tillery, and James R. Willis Motion for Partial Summary Judgment Based Upon Qualified Immunity Regarding the Claim for the Wrongful Death of Pedro Oregon Navarro has been served upon all counsel, by depositing copies in the U.S. Mail, first-class, postage prepaid, addressed as shown below on this 3 day of June, 1999, to the following addresses:

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