

Challenge of Standing or Capacity

Pursuant to F.R.C.P. 9(a) the defendants challenge the standing and/or capacity of the plaintiff, Claudia Navarro Pineda, to sue in her individual capacity and/or as a representative of the Estate of Pedro Oregon Navarro. Specifically, the defendants challenge, if indeed, Claudia Navarro Pineda is the mother of Pedro Oregon Navarro. The defendants also challenge the standing and/or capacity of Ana Isabel Lores as next friend of Ashley, minor daughter of Pedro Oregon Navarro; specifically, the defendants challenge if Ashley, is the minor daughter of Pedro Oregon Navarro. Further, the defendants challenge the standing and/or capacity of Blanca Lidia Viera, as next friend of Belinda, minor daughter of Pedro Oregon Navarro; specifically, the defendants challenge if Belinda is the minor daughter of Pedro Oregon Navarro.

Admissions and Denials

1. Defendants deny the allegations in paragraph one.
2. Defendants admit that all officers were acting under color of law in the course and scope of their employment with the City of Houston Police Department, but deny the remaining allegations in paragraph two.
3. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment of paragraph three. The defendants challenge the plaintiffs' lack of standing or capacity to be a party to this lawsuit.
4. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment of paragraph four. The defendants challenge the plaintiffs' lack of standing or capacity to be a party to this lawsuit.

5. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment of paragraph five. The defendants challenge the plaintiffs' lack of standing or capacity to be a party to this lawsuit.
6. Defendants admit that Rogelio Oregon Navarro is the brother of Pedro Oregon Navarro and was present at 6711 Atwell, # 16, but deny that Rogelio Oregon Navarro witnessed the shooting or that Pedro Oregon Navarro was killed without legal justification as alleged in paragraph six.
7. Defendants admit the allegation that another male suspect was present at 6711 Atwell, # 16, but did not know his name. Defendants deny that the other male suspect (if he is Salvador Lopez) witnessed the shooting and do not know whether Salvador Lopez is a resident of Harris County, as alleged in paragraph seven.
8. Defendants admit the allegation that a female was present at 6711 Atwell, # 16, but do not know her name. Defendants deny that she witnessed the shooting and do not know whether she is a resident of Harris County, as alleged in paragraph eight.
9. Defendants admit the allegations in paragraph nine.
10. Defendants admit the allegations in paragraph ten as it refers to each of them.
11. Defendants admit the allegations in paragraph 11.
12. Defendants admit the allegations in paragraph 12.
13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 13.
14. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 14.
15. Defendants admit the allegations in paragraph 15.

16. Defendants admit the allegations in paragraph 16.
17. Defendants admit the allegations in paragraph 17.
18. Defendants admit the allegations in paragraph 18, but deny the implication that the following facts were known to the officers at the scene of the traffic stop and initial arrest: (1) that Ryan Baxter was on probation or (2) that he had purchased and smoked crack cocaine.
19. Defendants admit that Ryan Baxter offered to provide information about a crack cocaine dealer who he claimed sold him narcotics, but deny plaintiffs' speculation that Baxter made a deal to avoid the Class C misdemeanor arrests he faced that night.
20. Defendants admit that Ryan Baxter was not a registered confidential informant with the Houston Police Department and that the defendants eventually learned that he was on probation, but deny the implication that these admitted facts prohibited Officers Herrada and Willis from talking to Baxter after he volunteered to give them information about a street-level drug dealer.
21. Defendants deny that there was ever going to be a "buy," but admits the remainder of the allegations in paragraph 21.
22. Defendants admit that while in custody, Ryan Baxter paged a person he claimed to be Rogelio Oregon Navarro, who offered to sell Baxter crack cocaine at the Jack-in-the-Box, located at Atwell and Bellaire. When Rogelio did not show at the Jack-in-the-Box, Baxter paged again and Rogelio said that Baxter could get the dope from "Pepe" at his apartment at 6711 Atwell, # 16.
23. Defendants admit the allegations of paragraph 23, but specifically deny that Mr. Baxter was told to make a "buy" of cocaine from the plaintiff, Rogelio Oregon Navarro.
24. Defendants admit the allegations in paragraph 24.

25. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment contained in paragraph 25.
26. Defendants deny the allegations in paragraph 26.
27. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment contained in paragraph 27.
28. Defendants deny the allegations in paragraph 28.
29. Defendants deny the allegations in paragraph 29.
30. Defendants incorporate by reference their responses in the preceding paragraphs.
31. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 31.
32. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 32.
33. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 33.
34. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 34.
35. Defendants deny the allegations in paragraph 35.
36. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 36.
37. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 37.

38. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 38.
39. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 39.
40. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 40.
41. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 41.
42. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 42.
43. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 43.
44. Defendants incorporate each preceding response by reference.
45. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 45.
46. Defendants deny the allegations in paragraph 46.
47. Defendants admit that there was no search warrant, but deny that the officers had no probable cause as alleged in paragraph 47. Defendants deny that they individually or collectively forcibly entered the plaintiffs' residence. The defendants deny that they repeatedly threatened, assaulted, or falsely imprisoned each of the plaintiffs.
48. Defendants deny the allegations in paragraph 48.
49. Defendants deny the allegations in paragraph 49.

50. Defendants deny the allegations in paragraph 50.

51. Defendants deny the allegations in paragraph 51.

AFFIRMATIVE DEFENSES

Qualified Immunity

52. Defendants, are immune from liability under the doctrine of public official immunity, also termed "qualified immunity".

53. Under a qualified immunity standard, an officer is exonerated if, given the objective facts and circumstances, a reasonable officer would not have understood, in light of pre-existing law, that he was violating the Plaintiffs' rights. *Brown v. Glossip*, 878 F. 2d 871, 874 (5th Cir. 1989). More specifically, the Supreme Court stated in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed. 2d 523 (1987):

[T]he right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence, more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

54. Under the qualified immunity test, immunity is only defeated if it is obvious that no reasonably competent officer could have concluded that the Defendants' acts were appropriate. *Malley v. Briggs*, 475 U. S. 335 (1986). "If officers of reasonable competence could merely disagree on this issue, immunity should be recognized."

55. The "objective reasonableness standard" under *Graham v. Conner*, 490 U.S.389, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), should be the prevailing case law on this issue of qualified immunity before this Court.

Self Defense

56. Texas peace officers have an affirmative duty to "interfere without warrant to prevent or suppress crime." TEX. CODE CRIM. PROC. art. 2.13. Peace officers, like all people, are entitled to use deadly force to protect themselves when necessary. TEX. PEN. CODE § 9.32. All people, including police officers, may use deadly force to protect the life of another. TEX. PEN. CODE § 9.33. Pedro Oregon Navarro did not submit to arrest or search in the living room, instead he ran to his gun. When confronted by uniformed Houston Police Officers at his bedroom door, Pedro Oregon Navarro made a fatal decision and pointed a handgun toward them.

Illegality

57. Pedro Oregon Navarro had no right to challenge the arrest of his brother, Rogelio Oregon Navarro, by pointing a loaded weapon at the defendants, who were uniformed Houston Police Officers.

"The use of force against another is not justified to resist an arrest or search that the actor knows is being made by a peace officer, . . . even though the arrest or search is unlawful. . ." TEXAS PENAL CODE, §9.31(b)(2).

Assumption of Risk

58. When Pedro Oregon Navarro confronted the uniformed police officers who were attempting to arrest his brother, Rogelio Oregon Navarro, by pointing a loaded weapon at the defendants, he assumed the risk of being shot while illegally resisting the arrest and/or search that he knew was being made by Houston Police Officers.

Deadly Force Authorized by Texas Law

59. "A peace officer is justified in using deadly force against another when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, . . . if the use of force would have been justified under subsection (a) and: the actor (officer) reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the actor or another if the arrest is delayed." TEXAS PENAL CODE, §9.51(c)(2). "When the suspect refused to stop and 'drop the gun' as ordered and continued to advance upon the officer, under the authority of §9.51. . . the [force used] by the officer was in good faith in his discretionary capacity within the scope of his authority." *Vasquez v. Hernandez*, 844 S.W. 2d 802, 805 (Tex. App.-San Antonio 1992, writ dismissed)

Cross-Claim

60. The defendants tender a cross-claim for relief against the co-defendant, the CITY OF HOUSTON. The defendants are seeking their costs and expenses for defending this lawsuit. Pursuant to the authority in §180.002, of the TEXAS LOCAL GOVERNMENT CODE, the City of Houston has a mandatory duty to provide legal counsel without cost to the defendants to defend the defendants against a suit for damages which involves an official act of the defendants within the scope of the defendants authority. The defendant, City of Houston, has refused to provide representation to the defendants in this cause of action.

Jury Demand

61. The defendants respectfully petition and request for a trial by jury.

Conclusion

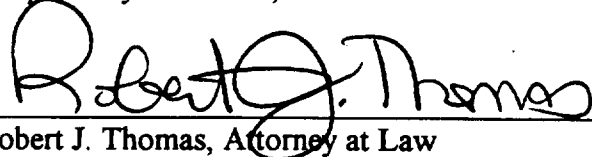
62. Crack cocaine is the cancer of our society. If Rogelio Oregon Navarro and his brother, Pedro Oregon Navarro, had not been involved in the illegal delivery of controlled substances in the City of Houston, the defendants would not have encountered the plaintiffs on this tragic night; if Pedro Oregon Navarro had not attempted to use deadly force to defend the arrest and/or seizure of his brother, this tragedy would not have occurred; and, both the plaintiffs and the defendants are victims in this tragedy.

63. "There is no duty to retreat before using deadly force justified by subsection (c) or (d)." TEXAS PENAL CODE, §9.51(e).

Prayer

64. For these reasons, defendants petition the court to enter judgment that plaintiffs take nothing against them, dismiss plaintiffs' suit with prejudice, assess costs against plaintiffs, and award defendants all other relief to which they are entitled.

Respectfully submitted,



Robert J. Thomas, Attorney at Law
TBA#19867300
Houston Police Officers' Union
1818 North Memorial Way, Suite 201
Houston, Texas 77007
(713) 426-0309; (713) 426-0054 Fax

Attorney for Defendants D. R. Barrera, P. A. Herrada,
L. E. Tillery and J. R. Willis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Original Answer of Defendants D. R. Barrera, P. A. Herrada, L. E. Tillery and J. R. Willis has been served upon all counsel, by depositing copies in the U.S. Mail, first-class, certified mail, return receipt requested and postage prepaid, addressed as shown below on this 11th day of January, 1999, to the following addresses:

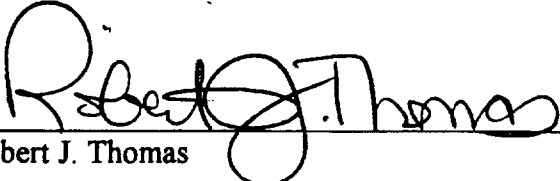
Mr. Paul Nugent and Mr. David Gerger
Foreman, Deguerin, Nugent & Gerger
909 Fannin, Suite 590
Houston, Texas 77010
CMRRR#P617242648

Mr. Richard Warren Mithoff and Mr. Michael L. Phifer
Mithoff & Jacks, L.L.P.
500 Dallas, Suite 3450
Houston, Texas 77002
CMRRR#P617242649

Mr. Robert Louis Cambrice
Senior Assistant City Attorney
City of Houston Legal Department
P.O. Box 1562
Houston, Texas 77251
CMRRR#P617242650

Fred A. Keys, Jr.
Attorney at Law
3401 Louisiana, Suite 270
Houston, Texas 77002
CMRRR#P617242651

Mr. Duncan Neblett, III
Attorney at Law
5 Greenway Plaza, Suite 1710
Houston, Texas 77046
CMRRR#P617242652


Robert J. Thomas