

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
AUG 25 1999
HOUSTON, TEXAS

**Response to Plaintiffs' Motion for Partial
Reconsideration of Qualified Immunity Ruling**

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

Nature and Stage of Proceedings

1. On July 29, 1999, this Court dismissed the Plaintiffs' claims under the Texas Wrongful Death Act against Defendants Strouse, Willis, Tillery and Perkins, on the basis of qualified immunity. On or about August 9, 1999, Plaintiffs filed their Motion for Partial Reconsideration of the Court's ruling, apparently urging the Court to find that the Defendants' alleged warrantless entry into the

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decedent's brother's apartment proximately caused Pedro Oregon's death, thereby overcoming Defendants' qualified immunity.

Argument and Authorities

2. Qualified immunity has been clearly established as a **threshold issue** 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. Plaintiffs cite three (3) cases which they represent stand for the proposition that a police officer's objective reasonableness regarding use of force is of no consequence if there is a fact question regarding the proximate cause of the decedent's death. Plaintiffs' first case is a dram shop liability case stating that an alcoholic beverage licensee has a duty not to pour liquor into an obviously drunk patron and that it is a jury issue whether the licensee breached that duty and proximately caused injuries when the drunk person then drives away and slams into another vehicle. *See El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987). Plaintiffs' second case is a medical malpractice case which discusses not only proximate causation, but superceding and intervening causes cutting off the causal chain. *See Hall v. Huff*, 957 S.W.2d 90 (Tex. App.-- Texarkana 1997, pet. denied). The patent omission in both of the above cases is any discussion (or application) of qualified immunity.

4. Plaintiffs' third case is the only case that even addresses the issue of qualified immunity within the context of the Wrongful Death Act. *See, Finnigan v. Blanco County*, 670 S.W.2d 313 (Tex. App.-- Austin 1984, no writ). However, the court in *Finnigan* addressed whether summary judgment was appropriate to dispose of the question regarding whether there was a **waiver** of

governmental immunity pursuant to a specific statutory provision (Vernon's Ann. Texas Civ. St. Art. 6252-19, §3, now V.T.C.A. Civil Practice and Remedies Code §101.021). *Finnigan*, at 316. In that case, the plaintiff was alleging that the defendant government employee's negligence in the use of a motor vehicle proximately caused plaintiff's injuries. It is noteworthy that plaintiff has never pled any specific waiver of immunity as provided in the Texas Civil Practice and Remedies Code.

5. Plaintiffs urge in their motion that even if the Defendants are entitled to summary judgment on the excessive force claim, they should be liable for Pedro Oregon's death under the Texas Wrongful Death Statute because of their alleged warrantless entry into the apartment, seemingly arguing that the officers' qualified immunity does not apply in a wrongful death case. Yet the Plaintiffs offer the Court no authority for ignoring the threshold issue of qualified immunity.

Intervening Cause

6. Defendant, Darrell Strouse filed his response to the plaintiffs' motion for partial reconsideration of qualified immunity ruling with this court on August 19, 1999. Defendants Tillery and Willis join with defendant Strouse and urge the court to affirm the court's prior ruling dismissing the plaintiffs' claims pursuant to the Texas Wrongful Death Act.

Further, if such is necessary, defendants Willis and Tillery plead that the intervening act of Pedro Oregon Navarro confronting the officers with deadly force and illegally resisting the arrest and/or search of his brother, Rogelio, relieves the defendants of any liability for the injury to Pedro Oregon Navarro. Pedro Oregon Navarro's decision to confront the uniformed police officers with deadly force, is an independent cause which intervenes between the original warrantless entry into the apartment; turns aside the natural sequence of events; and, produces a result which would not otherwise have followed and which could not have been reasonably anticipated.

7. The direct and proximate cause of injury to Pedro Oregon Navarro was his intervening decision to confront uniformed officers with deadly force and illegally resist a search or seizure.

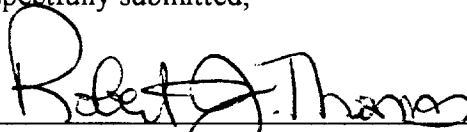
Conclusion

8. Plaintiffs have offered no authority to support their contention that the Court should ignore the threshold issue of qualified immunity and analyze the Defendants' liability under only the Texas Wrongful Death Act. The Court has made its findings regarding the objective reasonableness of the officers' conduct in using deadly force, which resolves the issue as to their liability in Pedro Oregon's death.

H. Prayer

9. For these reasons, Defendants, D. R. Barrera, P. A. Herrada, L. E. Tillery, and James R. Willis, respectfully request the Court to deny Plaintiffs' Motion for Partial Reconsideration of Qualified Immunity Ruling, and for all other and further relief to which they may be entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

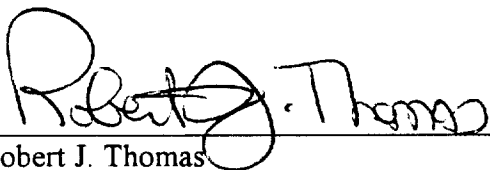
I hereby certify that a true and correct copy of the foregoing Response to Plaintiffs' Motion for Partial Reconsideration of Qualified Immunity has been served upon all counsel, by depositing copies in the U.S. Mail, first-class, postage prepaid, addressed as shown below on this 25th day of August, 1999, to the following addresses:

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