

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 apartment located at 6711 Atwell, Houston, Texas 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. See *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 stages 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 two cases lack any discussion or application of qualified immunity.

4. The case of *Finnigan v. Blanco County*, 670 S.W.2d 313 (Tex. App. - Austin 1984, no writ) is the only case which contains an analysis of qualified immunity within the context of the Texas Wrongful Death Act. The court in *Finnigan* addressed whether summary judgment was appropriate to dispose of the question regarding whether the moving party had waived governmental immunity pursuant to a specific statutory provision. *Finnigan*, at 316. In that case, the plaintiff alleged that the defendant government employee's negligence in the use of a motor vehicle proximately caused plaintiff's injuries. Plaintiffs in this case have not even plead any specific waiver of immunity.

5. Plaintiffs urge in their motion that even if Defendant Perkins' conduct was found to be objectively reasonable regarding the use of force, he should be liable for Pedro Oregon's death under the Texas Wrongful Death Act because of his alleged warrantless entry into the apartment. Plaintiffs are merely attempting to revive their Wrongful Death claim which this court dismissed by "bootstrapping" the wrongful death claim to the warrantless entry claim.

INTERVENING CAUSE

6. Defendants Strouse, Barrera, Herrada, Tillery and Willis filed responses to the Plaintiffs' motion for partial reconsideration of qualified immunity ruling with this court. Defendant Perkins joins with these Defendants and urge the court's prior ruling dismissing the plaintiffs' claims pursuant to the Texas Wrongful Death Act.

Further, if such is necessary, Defendant Perkins pleads that the intervening acts of Pedro Oregon Navarro, Rogelio Navarro, Salvador Lopez, Nelley Mejia and/or his co-defendants in this case relieves Defendant Perkins of any liability for the injury to Pedro Oregon Navarro. **This court has already found that some of Officer Perkins' actions were objectively reasonable as a matter of law.** Pedro Oregon Navarro's initial decision to confront the uniformed officers and the acts of the other plaintiffs and co-defendants in this case are independent causes which intervene between the alleged warrantless entry into the apartment and the eventual death of Pedro Oregon Navarro. Perkins' entry into the apartment had nothing to do with the death of Pedro Oregon Navarro.

CONCLUSION

7. The actions of Officer Perkins did not cause the death of Pedro Oregon Navarro. Plaintiffs have offered no authority to support their contention that the Court

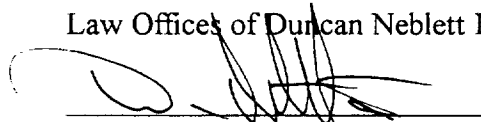
should ignore the threshold issue of qualified immunity and analyze Defendant Perkins' liability only under the Texas Wrongful Death Act. The court has made findings regarding the objective reasonableness of Defendant Perkins' conduct in using deadly force which resolves the issue as to his liability in Pedro Oregon's death.

PRAYER

8. For these reasons, Defendant Perkins respectfully requests the Court to deny Plaintiffs' Motion for Partial Reconsideration of Qualified Immunity Ruling, and for all other and further relief to which he may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on all interested parties in accordance with the Federal Rules of Civil Procedure on August 30, 1999, via certified mail, return receipt requested as listed below.

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A handwritten signature in black ink, appearing to read 'Duncan Neblett III', written over a horizontal line.

Duncan Neblett III

**IN THE 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, §
ROGELLIO OREGON NAVARRO, §
SALVADOR LOPEZ, and §
NELLY MEJIA, §

Plaintiffs §

v. §

CITY OF HOUSTON, §
D.H. STROUSE, §
D.R. BARRERA, §
P.A. HERREDA, §
D.R. PERKINS, §
L.E. TILLERY, and §
JAMES R. WILLIS, §

Defendants §

CIVIL ACTION NO. H-98-3877
JURY DEMANDED

ORDER ON
PLAINTIFFS' MOTION FOR PARTIAL
RECONSIDERATION OF QUALIFIED IMMUNITY RULING

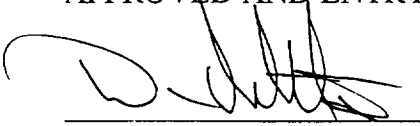
On _____, 1999, the court considered Plaintiffs' Motion for Partial Reconsideration of Qualified Immunity Order. After considering the motion and response of Officer David Perkins, the court:

DENIES the motion as to Defendant Officer David Perkins.

SIGNED: _____, 1999.

UNITED STATES DISTRICT JUDGE

APPROVED AND ENTRY REQUESTED:



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