

No. 09-10076

UNITED STATES COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT

CARMEN CEBALLOS, Individually and as the Representative of the
Estate of JOSE PACHECO CEBALLOS, Deceased, and
LUZ M. REYES Individually and as Guardian of A. R., Minor Child
Plaintiffs - Appellants,

v.

WILLIAM BRIDGEWATER, JOSE PORRAS, WILLIAM MULL, CHIEF OF
POLICE
and THE CITY OF PLAINVIEW,
Defendants - Appellees.

INTERLOCUTORY APPEAL
in NO. 5:08-CV-56 from the UNITED DISTRICT COURT
for the NORTHERN DISTRICT OF TEXAS, LUBBOCK DIVISION

Plaintiffs Appellate Brief

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representation are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

<u>Interested Persons</u>	<u>Connection and Interest</u>
Carmen Ceballos	Plaintiff-Appellant, Individually and as Representative of the Estate of Jose Pacheco Ceballos, Deceased.
Luz Maria Reyes	Plaintiff-Appellant, Individually and as Guardian of A.R. a Minor Child
A.R., a Minor Child	Plaintiff-Appellant
Ronald T. Spriggs	Attorney for Plaintiffs-Appellants
City of Plainview, Texas	Defendant–Appellee
John C. Anderson	Defendant–Appellee
William Bridgwater	Defendant–Appellee
Jose Porras	Defendant–Appellee
William Mull	Defendant–Appellee
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REQUEST FOR ORAL ARGUMENTS

Plaintiffs request oral arguments to aid the court, if it deems necessary, to decipher or clarify factual assertions or legal arguments.

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JURISDICTIONAL STATEMENT

DISTRICT COURT JURISDICTION

The basis of this case is rooted in 42 U.S.C. § 1983, for the fatal shooting death of Jose Pacheco Ceballos by William Bridgwater, Police Officer for the City of Plainview, Texas.

COURT OF APPEALS JURISDICTION

The basis of this case is rooted in 42 U.S.C. § 1983. Jurisdiction is conferred on this Court by U.S.C. §1291 which provides in relevant part that the courts of appeal shall have jurisdiction over appeals from all final decisions of the district courts.

DISTRICT COURT'S ORDERS

Disposing of all of Plaintiff–Appellants’ federal claims, on January 14, 2009 the district court (1) Granted Defendant’s, City of Plainview, Motion to Dismiss State Claims against Individuals Defendants , (2) Granted Defendant Bridgwater’s, Motion for Summary Judgment on Qualified Immunity, (3) Granted Defendant, Porras’, Motion for Summary Judgment on Qualified Immunity, and (4) Granted Defendant Mull’s, Motion for Summary Judgment on Qualified Immunity.

FILING DATES/TIMELINESS OF APPEAL

Plaintiff-Appellants filed notice of appeal on January 26, 2009.

STATEMENT OF ISSUES

- I. WHETHER THE COURT ERRED IN GRANTING DEFENDANT-APPELLEE’S, WILLIAM BRIDGWATER, SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY TO PLAINTIFF-APPELLANT’S EXCESSIVE FORCE CLAIM, GIVEN THE SUBSTANTIAL EVIDENCE THAT DEFENDANT-APPELLEE USED OBJECTIVELY UNREASONABLE AND EXCESSIVE FORCE WHEN HE SHOT AND KILLED JOSE CEBALLOS?

- II. WHETHER THE COURT ERRED IN GRANTING DEFENDANT-APPELLEE’S, JOSE PORRAS SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY ON THE ISSUE OF FAILURE TO SUPERVISE AND TO PROTECT JOSE CEBALLOS IN LIGHT OF THE UNCONTROVERTED EVIDENCE THAT HE WAS THE SUPERVISOR ON THE SCENE AND PERSONALLY INVOLVED IN THE U.S.C. 42§ 1983 CONSTITUTIONAL VIOLATION?

- III. WHETHER THE COURT ERRED IN GRANTING DEFENDANT-APPELLEE’S, WILLIAM MULL, SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY ON PLAINTIFF-APPELLANTS CLAIMS OF A POLICY MAKER MAKING POLICY OR CUSTOM THAT DIRECTLY CONTRIBUTED TO THE VIOLATION U.S.C. 42§ 1983?

- IV. WHETHER THE COURT ERRED IN GRANTING DEFENDANT-APPELLEE’S, CITY OF PLAINVIEW, SUMMARY JUDGMENT THAT DISMISSED PLAINTIFFS’ STATE TORT CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS?

STATEMENT OF THE CASE

Plaintiff–Appellants are Carmen Ceballos, Individually and as the Representative of the Estate of Jose Pacheco Ceballos, Deceased, Luz M. Reyes Individually and as Guardian of A. R., Minor Child; Defendant–Appellees are

William Bridgwater, Jose Porras, William Mull, Chief of Police, The City of Plainview and John C. Anderson, Mayor.

On March 4, 2008, Plaintiffs sued Defendants for violation of constitutional rights, Violation of 42 U.S.C. § 1983, Gross Negligence, Assault, Wrongful Death Survival Cause of Action, Intentional infliction of Emotion Distress, Failure to Adequately Supervise, Failure to Discipline and Failure to Train. [Complaint Document 1] .

On March 28, 2008, Defendant filed an answer and asserted the defenses of sovereign immunity, qualified immunity, official immunity, Texas Tort Claims Act, Defense of Justification, Defense of Probable Cause and/or Exigent Circumstances, Defense of Texas Civil and Remedies Code, Defense of the Eleventh Amendment, and the Defense of Due Process. On the same day, John C. Anderson moved to dismiss the suit against him. On April 2, 2008, the Court ordered a stay of discovery and that Plaintiffs file a reply pursuant to Federal Rule of Civil Procedure 7(a) in response to the issue of qualified immunity raised by the defendants. Defendants timely filed their answers on April 25 and 28, 2008. [Document 5,6 &7].

On September 5, 2008, the Court entered an Order and Judgment to dismiss Anderson from this suit and ordered that all motions to dismiss or motions for summary judgment as to individual Defendants Bridgwater, Porras, and Mull be

filed within forty-five days of the order, which the Court extended to November 19, 2008 upon an unopposed motion to extend time.

Defendants Bridgwater, Porrás, and Mull timely filed motions for summary judgment on the issue of qualified immunity, along with the City's motion to dismiss all state claims asserted against Bridgwater, Porrás, and Mull in their individual capacity. [Document 19].

On November 10, 2008, City of Plainview filed Motion to Dismiss Tort Claims against Individual Defendants. [Document 23].

On November 19, 2008, Defendant filed a Motion for Summary Judgment on the Issue of Qualified Immunity. [Document 31].

December 1, 2008, Plaintiffs filed Response to Dismiss Individual Defendants. [Document 23].

On December 2, 2008, Plaintiffs filed a motion to enlarge time to file a response to Defendants' summary judgment. [Document 33].

On December 3, 2008, an Order was issued that granted Plaintiffs an enlargement of time to file response to Defendants' summary judgment until December 29, 2008. [Document 34].

Plaintiffs timely filed a Response to Defendants summary judgment on December 29, 2008. [Documents 37, 38, 39 & 40].

On January 14, 2009, the district court entered an Order and Judgment that

dismissed the state court claims against the individuals pursuant to Texas Civil Practice and Remedies Code section 101.106(e) and dismissed claims against the individual Defendants based on Qualified Immunity. [Document 42 & 43].

On January 26, 2009, Plaintiffs filed Notice of Appeal. [Document 44].

STATEMENT OF THE FACTS

LUZ MARIA REYES

On, September 11, 2006, Luz Maria Reyes (“Maria”) received a phone call from her mother, Carmen Ceballos that her brothers, Andres Pacheco and Jose Ceballos (“Jose”), deceased, were fighting. [Document 40 Recording of Luz Maria Reyes on CD from the start to 16:20]. Maria called the police and told them that her brothers were fighting. Maria went to her mother’s house with her daughter A. R. and Israel Gutierrez Rodriguez. Id. Maria arrived at the house about the same time as Officer William Bridgwater (“Bridgwater”), who Maria referred to as the American or white police officer. Id. Jose would not open the door for anyone. Id. But, at one point, Jose was going to open the door for Maria but Bridgwater pushed her to the side and stepped in front of her. Id. Jose did not open the door. Id. Jose looked out the window and told Maria three times to tell the police to leave. Id. While Jose had the curtain pulled open Maria saw him kiss their mother. Id. Then Porrás arrived on the scene. Id. Bridgwater was acting very violent. Id. Bridgwater kicked the door open. Id. When the door opened. Id. Jose was standing in the

doorway with a knife in his hand. Id. Jose told the police to leave. Id. The police started telling him in Spanish and English to put it down. Id. Porras holstered his weapon. Id. Maria told the police she could get the knife from him. Id. Bridgwater pushed Maria to the side and fired his gun and Jose fell to the ground. Id.

Maria's deposition testimony clarifies that Jose did not make any aggressive moves towards the police:

Q. Right before Jose was shot, did he ever raise his hand?

A. No, he never lifted his hand. He was smoking and the only thing he did was just flick his cigarette butt.

Q. Did you ever see Jose take an aggressive step toward the officers?

A. No. He never did move from where he was standing. He was just standing there kind of nervous and was kind of like swaying from one side to the other. He never gave – took a forward step or backwards.

Deposition Luz Maria Reyes.[USCA5 pg. 962, L. 16-25].

The autopsy report indicated that the shot that was fired from Bridgwater's gun was the cause of Jose's death.[USCA5 pg.698].

Carmen Ceballos

According to Carmen Ceballos', Maria came into the house as soon as Bridgwater kicked open the door and stood beside Jose. Deposition of Carmen

Ceballos.[USCA5 pg. 965, L.4-12]. Maria was to one side of Jose and the Policeman was outside at the door. Id.

Maria stood next to Jose. Id. When Maria asked Jose for the knife is when the police shot him. Id. The police never gave Jose time to comply with Maria's request. Id. Maria was still talking to Jose when Jose was shot. Id. Jose never moved toward the police and he never raised his arm in a threatening manner to the police officers. Id.

Carmen Ceballos' statements are consistent with the statements of Maria.

Maria Apolinar Pacheco Lopez

When Bridgwater arrived on the scene, Maria Apolinar Pacheco Lopez ("Lopez") told him that Jose was not fighting his parents. See [Document #40 Recording of Lopez listed as #DM200037 on CD from 9:10-10:52]. Jose just did not want to open the door. Id. Lopez continued to inform Bridgwater that Jose was crazy and that he was schizophrenic. Id.

William Gaut

On pages [USCA5 pg. 978] and [USCA5 pg. 979] of the Report of Expert Witness, Mr. William Gaut ("Gaut") states how Bridgwater and Sgt. Porras' testimony differs from Maria and independent witnesses.[USCA5 pg. 978]. Bridgwater, on one hand, claims that Mr. Ceballos raised the knife in a forward position pointing it at him and then took a step forward. [USCA5 pg. 979]; then

Bridgwater claims, he reacted by shooting Mr. Ceballos one time. [USCA5 pg. 978]. On the other hand, according to Maria and Carmen, Maria was standing slightly forward and to the right of Bridgwater and Mr. Ceballos was standing stationary with the knife in his hand when Bridgwater pushed Maria to the side and shot Jose. [USCA5 pg. 979] Maria denies an aggressive movement or forward motion by Jose who she describes as standing and “swaying” from side to side.[USCA5 pg. 979].

On page,[USCA5 pg. 981] in the middle of the page of the Expert Witness Report, Gaut concludes that, “Mr. Ceballos did not exhibit words or actions sufficient for a reasonable police officer to believe that Bridgwater or any third party citizen was in immediate jeopardy of great bodily harm or death.”

After reviewing all the available information as listed in the Expert Witness Report on page,[USCA5 pgs. 976 & 977] Mr. Gaut concludes on page [USCA5 pg. 979] of the report that, “The City of Plainview, through the Plainview Police Department, failed to properly hire, train supervise, and discipline its police officers.” “This breach of duty by the City of Plainview directly contributed to the death of Jose Pacheco Ceballos.” [USCA5 pg. 979].

On page [USCA5 pg. 983] of the Expert Witness Report, Gaut states, that Bridgwater had a history of making false reports, insubordination, and the use of excessive force. Furthermore, the expert witness states, that Bridgwater on a

different occasion gave false information.[USCA5 pg. 983].

Sgt. Porras

Porras never knew that Bridgewater had been in three auto accidents while working for Plainview Police Department. [USCA 5 pg. 999,L18-1001, L., 11]. He did not know that two of the accidents were determined to be Bridgewater's fault. Id. He did not know that one of the lieutenants suggested that Bridgewater needed to slow down and think before acting in situations. Id.

Porras believed that he could trust Bridgewater's judgment better than his own because Bridgewater was a commissioned officer. [USAC 5 pg. 1002, L.6-1003,L.,1]. And, although he had a lot more experience than Bridgewater, Bridgewater could make better decisions than him. Id. But, Porras acknowledged that experience plays a big role in police work. Id. He did not believe that his experience gave him the ability to assess the situation better than Bridgewater. Id. Porras had no knowledge of Bridgewater's experience with domestic cases. Id.

SUMMARY OF THE ARGUMENTS

1. Because Maria and Carmen testify that Jose did not make an aggressive move and that Jose did not have time to comply with the officer's instructions, use of force causing death was excessive and unreasonable.
2. Because Bridgewater's use of force causing death was excessive and

unreasonable, Sgt. Porrás' failure to intervene, protect Jose, or otherwise supervise Bridgwater, Sgt. Porrás is liable under § 1983, especially when Sgt. Porrás was personally involved in the violation of Jose's constitutional rights.

3. Because Chief Mull as a policy maker eschewed standards of vetting, evaluating, and retaining employees he established policies and customs that allowed his officers to engage in conduct that physically endangered individuals and authorized and acquiesced to the deprivation of federal rights.
4. Because the Garcia case is distinguishable from the case at bar and § 101.106 of the Texas Civil Remedies and Practice Code does not govern intentional torts summary judgment should not be granted.

ARGUMENTS

STANDARD OF REVIEW

The Appellate Court reviews a district court's grant of summary judgment de novo. Waltman v. Payne, 535 F.3d 342, 349 (5th Cir.2008) (citing Fed.R.Civ.P. 56(c)). The court must resolve any factual controversies in favor of the non-moving party. Richter v. Merchants Fast Motor Lines, Inc., 83 F.3d 96, 98 (5th Cir.1996). Thus, in reviewing all of the evidence, the court must consider it in a light most favorable to Plaintiffs, drawing all factual inferences therefrom and

making all credibility determinations related therefrom in its favor.

ISSUE: Whether the court erred in granting defendant-appellee's, William Bridgwater, summary judgment based on qualified immunity to plaintiff-appellants' of claim excessive force, given the substantial evidence that defendant-appellee used objectively unreasonable and excessive force when he shot and killed Jose.

QUALIFIED IMMUNITY

In Johnston v. City of Houston, 14 F.3d 1056, (5th Cir.1994), the Fifth Circuit rejected the defendant's claim to summary judgment on the qualified immunity issue because “[d]ivergent versions of what happened” had been offered by the parties. *Id.* at 1058. In Johnston, the court held that because a genuine dispute as to the material and operative facts of the case existed “ [s]ummary judgment is inappropriate unless plaintiff's version of the violations does not implicate clearly established law .”*Id.* at 1061. Subsequently, in Goodson v. City of Corpus Christi, 202 F.3d 730 (5th Cir.2000)(citing Johnston), the Fifth Circuit held that a court cannot draw a conclusion of law from disputed facts. *Id.*

Moreover, a case which turns on the credibility of witnesses' testimony should not be resolved on summary judgment. See Bazan v. Hidalgo County, 243 F.3d 481, 492 (5th Cir.2001).

The official immunity standard of good faith derives “substantially” from qualified immunity’s standard. City of Lancaster v. Chambers, 883 S.W.2d 650, 656 (1994). As such, the disputed facts of Jose Ceballos behavior also prevents this court from granting summary judgment that Officer Bridgwater has official immunity.

EXCESSIVE FORCE

Established law clearly provides that plaintiff has a Fourteenth Amendment right to be free from the use of excessive force by police. “Claims that law enforcement officials have used excessive force in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen ... must be judged by reference to the Fourth Amendment’s ‘reasonableness’ standard.” Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). The Court, however, must take care not to substitute its judgment for that of the reasonable officer on the scene. See *id.* at 396, 109 S.Ct. at 1872. In considering “reasonableness,” the court must include allowances for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation. *Id.* at 396-97, 109 S.Ct. at 1872. To that end, the Fifth Circuit has adopted the following three-prong test for excessive force cases: the plaintiff must show (1) at least some injury, which (2) resulted directly and only from the

use of force that was clearly excessive to the need, and the excessiveness of which was (3) objectively unreasonable. See Ikerd v. Blair, 101 F.3d 430, 434 (5th Cir.1996)(citing Spann v. Rainey, 987 F.2d 1110, 1115 (5th Cir.1993)).

ANALYSIS

Jose was shot by Bridgwater that resulted in his death, (2) Jose's death resulted directly and only from the use of force that was clearly excessive to the need, and the excessiveness of which was (3) objectively unreasonable. The relevant question in this case is whether the force was excessive or objectively unreasonable.

As to whether Bridgwater's use of force was unreasonable, the facts of the surrounding circumstances and the actions exhibited by Jose are well disputed. And the parties cannot agree where the witnesses were located at the time of the shooting. Plaintiff–Appellants tender deposition testimony of eye witness Carmen Ceballos, eye witness Maria Reyes, and eye witness Maria Apolinar Pacheco Lopez. Plaintiff–Appellants also tender the expert witness report of William T. Gaut [USCA5 pg. 984-988] and some of the supporting information that he reviewed.

Plaintiff–Appellants also complain that Officer Bridgwater is not credible.

Plaintiff–Appellants offer Mr. Gaut's expert opinion that the force was excessive. With respect to Plaintiff–Appellants' allegations of wrongful death and

use of excessive force in violation of the United States Constitution, actionable under 42 U.S.C. § 1983.

In addition, to the disputed facts of the witnesses, Mr. Gaut cites in his report that in his opinion that the (1) deadly force used by Officer William Bridgwater was excessive and unreasonable, [USCA5 pg. 979] (2) deadly force used by Bridgwater violated the reasonable and nationally accepted standards of police procedure, and the constitutional right of Jose Ceballos, (3) the unreasonable, excessive and deadly force used by Bridgwater, was intentional and with indifference for the safety, well-being, and rights of Jose. Id.

Mr. Gaut states, “And though Mr. Ceballos had the requisite opportunity, based on his distance from Bridgwater, to use the weapon effectively, Jose did not exhibit words or actions sufficient for a reasonable police officer to believe that Bridgwater or any third party citizen was in immediate jeopardy of great bodily harm or death. [USCA5 pg. 981].

Bridgwater is inconsistent. On the video/Audio Tape, recorded at the scene of the event, Bridgwater is heard (11:50:30)¹, in answer to the question “Who shot him?”, to say: “I did . He had this in his hand and he made a violent move.” Later, on that same tape, Bridgwater is heard (11:52:00) to say: “He appeared at the door with a knife in his **right hand**, making threatening gestures. He **moved his left**

¹ Bridgwater’s in car video.

hand like this and I fired.” Id. [emphasis Added].[USCA5 pg. 981]. When Bridgwater arrived on the scene, he was told by Lopez that there was no fighting inside the house and that Jose just did not want to open the door. See [Document #40 Recording of Lopez listed as #DM200037 on CD from 9:10-10:52].

Summary judgment is inappropriate because credibility is a critical issue. Here, Bridgwater’s repeated history of falsifying information supports, by more than a scintilla, a suspicion of mendacity. [USCA5 pg. 983]. The suspicion of mendacity enhances because Bridgwater made a false report regarding a prior use of excessive force, similar to the issue at hand. Id.

ISSUE: Whether the court erred in granting defendant-appellee’s, Jose Porras summary judgment based on qualified immunity on the issue of failure to supervise and to protect the Jose Ceballos, in light of the uncontroverted evidence that he was the supervisor on the scene and personally involved in the U.S.C. 42§ 1983 constitutional violation.

FAILURE TO SUPERVISE

The issue of whether a supervisor may be held liable under 42 U.S.C. § 1983 requires a separate analysis than that applied above. Section 1983 does not create vicarious or respondeat superior liability. Monell v. New York City Dep’t of Soc. Servs., 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978);

Thompkins v. Belt, 828 F.2d 298, 303-04 (5th Cir.1987). Rather, a plaintiff must show either the supervisor personally was involved in the constitutional violation or that there is a “sufficient causal connection” between the supervisor's conduct and the constitutional violation. Thompkins, 828 F.2d at 304; see also Southard v. Texas Bd. of Criminal Justice, 114 F.3d 539, 550 (5th Cir.1997) (“[T]he misconduct of the subordinate must be affirmatively linked to the action or inaction of the supervisor.”). A supervisory official is held to a standard of “deliberate indifference,” which requires proof that the supervisor “disregarded a known or obvious consequence of his action.” Southard, 114 F.3d at 551 (internal quotation marks omitted). An officer who is present at the scene and does not take reasonable measures to protect a suspect from another officer’s use of excessive force may be liable under section 1983. Hale v. Townley, 45F.3d 914 (5th Cir. 1995).

ANALYSIS

With regard to Plaintiff–Appellant's claim against Sgt. Porras in his capacity as supervisor, the district court should have denied summary judgment on the findings of material facts that Sgt. Porras was on the scene at the time of the shooting; at the time of the shooting Porras was the highest-ranking officer on the scene; that Sgt. Porras approved the actions of Bridgwater by acquiescence.

Porras personally was involved in the constitutional violation. Porras was

supposedly supervising Bridgwater at the shooting. Porras inaction to deter or assess Bridgwater's unreasonable acceleration and escalation of force affirmatively linked him to the misconduct of Bridgwater.

Porras, also as supervisor, had a duty to know the competencies of subordinates working under him. Porras never knew that Bridgwater had been in three accidents while working for Plainview Police Department. [USCA 5 pg. 999,L18-1001, L., 11]. Porras did not know that two of accidents may have been the Bridgwater's fault. Id. He did not know that one of the lieutenants suggested that Officer Bridgwater needed to slow down and think before acting on a situation. Id.

Porras believed that he could trust Bridgwater's judgment better than his own because Bridgwater was a commissioned officer. [USAC 5 pg. 1002, L.6-1003,L.,1]. And, although he had a lot more experience than Bridgwater, Bridgwater could make better decisions than him. Id. But, Porras acknowledged that experience plays a big role in police work. Id. He did not believe that his experience gave him the ability to assess the situation better than Bridgwater. Id. Porras had no knowledge of Bridgwater's experience with domestic cases. Id.

Sgt. Porras approved the shooting of Jose by his non-actions. Sgt. Porras personally took part in the events that led to the death of Jose by acting as overall supervisor. Sgt. Porras acted with deliberate indifference concerning Jose'

constitutional rights because Porras did not question any of Bridgwater's violent actions that led to the death of Jose.

ISSUE: Whether the court erred in granting defendant-appellee, William Mull, summary judgment based on qualified immunity on plaintiff-appellant on the issue of failure to supervise in light of the uncontroverted evidence that he was the supervisor on the scene and personally involved in the U.S.C. 42§ 1983 constitutional violation.

DELIBERATE INDIFFERENCE

Deliberate indifference is a standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. Estate of Davis v. City of N. Richland Hills, 406 F.3d 375, 381(5th Cir. 2005) The Plaintiff must generally demonstrate that the municipality or supervisor had notice of a pattern of prior acts “fairly similar to what ultimately transpired.”Estate of Davis, 406 F.3d at 383. A municipality faces Section 1983 liability “when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury...” Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 694 (1978). Proof of municipal liability sufficient to satisfy Monell requires: (1) an official policy (custom), of which (2) a policy maker can be charged with actual or

constructive knowledge and (3) a constitutional violation who is the moving force is the policy (or custom). Pineda v. City of Houston, 291 F.3d 325, 328 (5th Cir. 2002). For a municipality to be liable on account of its policy, the plaintiff must show, among other things, either (1) that the policy itself violated federal or authorized or directed the deprivation of federal rights or (2) that the policy as adopted or maintained by the municipality's policy with deliberate indifference as to its known or obvious consequences. Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force, 379 F3d 293, 309 (5th Cir. 2004).

Analysis

Chief Mull instituted policies and customs that allowed his officers to be above the law. Officer Bridgwater could be categorized as a menace to society but he was protected by the Plainview Police Department. He was above the law. He endangered people lives on the road without consequences. Bridgwater had a reckless disregard for traffic regulations before he joining the Plainview Police Department, with multiple speeding violations.[USCA5 pg. 991]. His traffic violations meant nothing to the Plainview Police Department. Two out of three on duty auto accidents had been determined to be Bridgwater's fault and he never received a traffic ticket. [USCA5 pg. 948 L. 7-22].Chief Mull's customs was not to have a policy to govern his officers.

As Mr. Gaut concludes on page [USCA5 pg. 979] of the report that, "The

City of Plainview, through the Plainview Police Department, failed to properly train, supervise, and discipline its police officers.” “This breach of duty by the City of Plainview directly contributed to the death of Jose Pacheco Ceballos.” [USCA5 pg. 979]. Chief Mull was the policy maker for the Police Department. Chief Mull was responsible for all the activities of the Plainview Police Department. Chief Mull allowed Sgt. Porras to be in a supervisory position and not control his subordinates, as demonstrated during the shooting of Jose. There were no consequences to the actions of Sgt. Porras or the people he supervised like Bridgwater. Therefore summary judgment for Chief Mull should be reversed.

ISSUE: Whether the court erred in granting defendant-appellee’s, City of Plainview’s summary judgment that dismissed plaintiff–appellants’ state tort claims against the individual defendant–appellees.

STATE LAW INTENTIONAL TORT CLAIMS AND THE TEXAS TORT CLAIMS ACT

Article I, section 13 of the Texas Constitution provides that “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law.” TEX. CONST. art. I, § 13. This clause, sometimes referred to as the “Open Courts Provision,” acts as an additional due process guarantee granted in the Texas Constitution, and prohibits the legislature from arbitrarily withdrawing all legal remedies from

anyone having a well-defined cause of action under the common law. See Sax v. Votteler, 648 S.W.2d 661, 664-65 (Tex.1983); Andress v. Macgregor Medical Asso. P.A., et al., 5 S.W.3d 855, 858-59(Ct.App.Houston--14th Dist. 1999). Each Plaintiff has a due process right and an open courts right that are essentially identical because the open courts provision is, quite plainly, a due process guarantee. Vernon's Ann. Texas Const. Art. 1, §§ 13, 19. Public policy does not work to strip one of his constitutional right to due process.

ANALYSIS

In their Motion for Summary Judgment Defendant–Appellee, City of Plainview, depends on Mission Consolidated Independent School District, v. Garcia, et al. 253 S.W.3d 653 (Tex.2008). The Garcia case is distinguishable from the case at hand. In Garcia, the Mission Consolidated Independent School District (“ISD”) terminated the employment of three long-time employees, Gloria Garcia, Melinda Sotuyo, and Deborah Mendia (collectively, “Garcia”). Id. All three filed identical lawsuits against the ISD and H. F. “Jackie” Dyer, the ISD superintendent, which were consolidated on appeal. *Emphasis Added*. Garcia sued the ISD for discriminatory wrongful discharge in violation of the TCHRA. Tex. Lab. Code Section 21.001-21556. Id. She also alleged common-law claims against the ISD and Dyer for international infliction of emotional distress and against Dyer for defamation, fraud, and negligent misrepresentation. Id.

The ISD filed pleas to the jurisdiction contending Garcia's decision to sue both the ISD and its employee barred recovery against the ISD pursuant to section 101.106(b) of the Texas Tort Claims Act, which provides that the "filing of a suite against any employee of a governmental unit... immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter." Tex.Civ.Prac. & Rem.Code and 101.106(b). Id. The Trial court denied the ISD's pleas, and the court of appeals affirmed. 166 S.W.3d 902, 903.Id. The Supreme Court of Texas granted the ISD's petitions to determine the scope of the Tort Claims Act's election -of -remedies provision and its effect on Garcia's claims. Id. Garcia 655.

Unlike Garcia, the case at hand has four (4) Plaintiffs and the claims are independent of each other. The claims are not identical. Garcia, was a case of several Plaintiffs filing lawsuits that mirrored one another. Thus, the defects of one Plaintiff's claims or filings in Garcia were applicable to the other Plaintiffs. The Garcia case only has one (1) Plaintiff per identical lawsuit.

In a multi-Plaintiff case with different claims, one Plaintiff cannot and should not be held responsible for the other Plaintiffs actions. And, that is why that case is distinguishable from the case at hand and makes Garcia not applicable.

In addition, the Defendant–Appellee was not nonspecific as to which

Plaintiff–Appellant it was referring to or what claims should be dismissed. And, Defendant–Appellee has not offered any proof that show the claims filed are only against The City of Plainview. In fact, Defendant–Appellee failed to show how each Plaintiff–Appellant’s claims are related to each Defendant–Appellee independently and/or collectively.

CONCLUSION

Jose’s possession of a knife, alone, was not enough probable cause for use of deadly force. Otherwise, Jose would have been shot at the instant he was seen with the knife. The crux of this case is whether Jose made an aggressive move. Maria says he did not. Carmen says he did not. A jury could believe Maria or Carmen. Because a jury could believe that Jose did not make an aggressive move, summary judgment on these facts must be reversed. Also, William Gaut says that the use of force was unreasonable. Because a jury could believe William Gaut, summary judgment must be reversed. Additionally, as the claims and defenses of Officer Porras’ and the City of Plainview are dependent on a jury determination of whether Jose made an aggressive move, summary judgment on those issues must be reversed. Because a jury could believe that Jose died because Mull maintained a policy or custom not to supervise or discipline police officers summary judgment must be reversed. Plaintiff–Appellants ask this Court to reverse the district court’s

order of summary judgment and remand the case for jury trial.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I have served counsel of record in this case including the following with one (1) true and correct paper copy and an electronic copy on a CD in PDF form of the foregoing Plaintiff–Appellants’ Appeal Brief by sending same via United States certified mail, return receipt requested, postage prepaid to:
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P.O. Box 1499
Lubbock, Texas 79401

On this the 6th day of April, 2009.

Ronald T. Spriggs