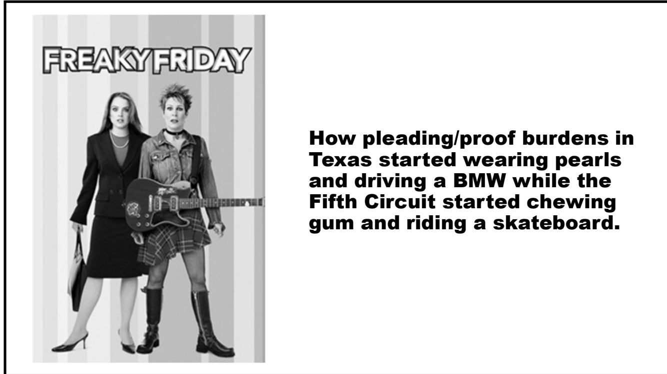


How pleading/proof burdens in Texas started wearing pearls and driving a BMW while the Fifth Circuit started chewing gum and riding a skateboard.

1

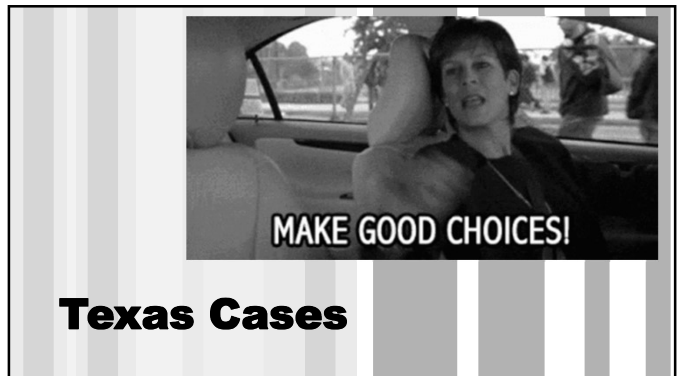
Overview

2

Overview

- Texas Cases effectively increasing pleading burdens in suits against the government
- Texas Cases shifting burden of proof to plaintiff
- Fifth Circuit cases effectively reducing pleading burdens
- Fifth Circuit schizophrenia over use of BWC footage in 12(b)(6)

3



Texas Cases

4

Shady Shores v. Swanson

- Plaintiff always retains burden of proof for SMJ
- No-evidence MSJ/plea OK

5

Maspero & Riojas

- City of San Antonio v. Maspero
  - Plaintiff bears burden to negate emergency exception 101.055
  - Plaintiff must demonstrate causal nexus between claim and reckless or illegal act
- City of San Antonio v. Riojas
  - Official immunity is an affirmative defense
  - If it applies governmental unit retains its immunity
  - Plaintiff must prove both “arises from” motor vehicle and proximate cause

6

Dohlen v. City of San Antonio

- "Save Chick-fil-a" law
- 91a motion to dismiss
- When immunity is waived for an alleged violation of a statute, at the jurisdictional stage, a plaintiff must "actually allege" a violation of the statute
- A plaintiff "actually alleges" violation of a statute "by pleading facts that state a claim thereunder
- Requiring the plaintiff's pleading to stand on more than bare allegations to trigger immunity protects the use of pleas to the jurisdiction

7

Gulf Coast Center v. Curry

- Caps are not limits on liability
- Caps implicate subject-matter jurisdiction
- Plaintiff retains burden to show which cap applies
- Government unit retains immunity from suit for claim in excess of the cap

8

Gulf Coast Center v. Curry, cont'd

- $250,000 cap
  - Municipality single injury or death
  - State government single injury or death
- Level 1—$250,000 or less
  - 15 RFP
  - 15 Rogs
  - 15 RFA

9

Rattray v. City of Brownsville

- Plaintiff must plead FACTS to bring their case within a waiver
- Plaintiff must plead FACTS to negate any exception that might withdraw the waiver
- Plaintiff doesn't have to march through provision by provision
- Plaintiff must negate exceptions that their allegations plausibly implicate, which depends on the nature of the dispute

10

State Cases to watch

11

Hannah Tanner v. Texas State

- Does a governmental unit need to be sued AND SERVED with citation during limitations under Govt. code § 311.034?

12

Official Immunity/Emergency Exception

- City of Houston v. Sauls
- City of Houston v. Ruben Rodriguez
- City of Austin v. Powell
- City of Houston v. Rivera
- City of Houston v. Jimmy Jones
- City of Killeen—Killeen Police Dep't v. Terry
- City of Killeen Police Dep't v. Fonseca
- City of Houston v. Nicolai

13

Fifth Circuit Cases

14

Iqbal & Twombly

***Ashcroft v. Iqbal*: The New Federal Pleading Standard**

JUNE 2009 | COMMENTARY

On May 18, 2009, in a 5-to-4 decision in *Ashcroft v. Iqbal*, the Supreme Court stiffened the federal pleading standard under Rule 8 of the Federal Rules of Civil Procedure. *Iqbal* continues down the path set by the Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*. Itmakes clear that the stricter pleading standard announced in *Twombly* applies to all civil actions in federal court, not just to antitrust or other complex cases, as many courts had held. This welcome development makes it considerably more difficult for plaintiffs armed only with vague factual allegations to launch expensive litigation. At the same time, *Iqbal* raises difficult questions about how to properly apply this new federal pleading standard and complicates the calculus for plaintiffs and defendants alike at the pleading stage of civil cases in federal courts.

15

Carswell v. Camp

- Qualified immunity must be decided at the earliest stage
- Immunity from suit not just liability
- Collateral order doctrine extends to refusal to rule
- Claims must survive QI without ANY discovery
- If MTD denied, Defendant can appeal OR move for discovery limited to QI, do MSJ, then appeal

16

Tuttle v. Sepolio

THE NICHOLAS PLAINTIFFS' FIRST AMENDED ORIGINAL COMPLAINT AND JURY DEMAND

1. Murder, corruption, lies, sex, and perjury – the history of the Houston Police Department, and in particular, the Houston Police Department's ("HPD") Narcotics Squad 15, plays out like a scene from Training Day.[1] As approved and encouraged by the leaders of the City of Houston, Squad 15 operated as a criminal organization and tormented Houston residents for years by depriving their rights to privacy, dignity, and safety. This

17

Tuttle v. Sepolio, cont'd

- Warrant claim
- Excessive force
- Supervisory liability for both
- *Monell* for both

18

Tuttle v. Sepolio, cont'd

B
Tuttle v. Sepolio
Nov 02, 2022
5th Cir.(Tex.)
Remanding A

E
Tuttle v. Sepolio
May 23, 2023
5th Cir.(Tex.)
Redesignating as Opinion D

D
Tuttle v. Sepolio
May 23, 2023
5th Cir.(Tex.)
Affirming in Part, Vacating in Part, Reversing in Part A
Affirming in Part, Vacating in Part, Reversing in Part C

A
Tuttle v. City of Houston
Jun 01, 2022
S.D.Tex.

C
Tuttle v. City of Houston
Dec 16, 2022
S.D.Tex.
Remand from B

19

Tuttle v. Sepolio, cont'd

- **Order 134 August 2021**
  - **Complaints allege facts that overcome QI**
  - **But 5th amendment requires stay**
  - **No depositions**
  - **Defers ruling on QI until narrowly-tailored discovery**

[1] This narrowly tailored discovery will be limited to resolution of Plaintiffs' (1) Fourth Amendment claims against Defendants Reyna, Wood, Pardo, Lovings, Ashraf, Medina, Gonzalez, Gallegos, and Sepolio for use of excessive force and (2) supervisory liability claims against Defendant Gonzalez. Where Plaintiffs have not alleged sufficient facts in their Amended Complaints to state a claim for relief that would overcome the qualified immunity defense, and where narrowly tailored discovery is not required to decide the issue of qualified immunity, the Court will issue a ruling forthwith.

20

Tuttle v. Sepolio, cont'd

- **Order 190 June 2022**
  - **Plaintiffs stated sufficient facts to overcome QI**
  - **Court can't rule on QI**
  - **Ordered 4 depositions; limited to QI**

21

Tuttle v. Sepolio, cont'd

- **Fifth Circuit oral argument October 2022**
- **Remanded to district court for clarification**
  - **Did it rule on QI in motions to dismiss?**
  - **If it did not, it must do so without discovery**

22

Tuttle v. Sepolio, cont'd

- **Order 229 December 2022**
  - **Did not previously rule**
  - **Warrant claim did not survive Independent Intermediary**
  - **Excessive force survived**
  - **Direct claims against supervisor survived**
  - **Supervisory liability survived**

23

Tuttle v. Sepolio, cont'd

- **Excessive force**
  - **Any firing done by Tuttle, Plaintiffs contend, was done purely in defense of himself and his wife. As a result of the gunfire, Tuttle and Nicholas were killed and four officers seriously injured.**
  - **Plaintiffs' allegations state an excessive-force claim that overcomes qualified immunity. Accepting Plaintiffs' version of events as true, the officers fired upon Tuttle and Nicholas without provocation. Taken together, the facts alleged are sufficient at the pleading stage. The officers deny that they shot first, as is their right. But such a denial does not override our obligation to accept the well-pleaded facts.**

24

Tuttle v. Sepolio, cont'd

- Supervisory liability
- Majority:
  - Gonzales knew about Goines but did nothing to correct him = deliberate indifference
  - Causal link pled
  - QI????
- Dissent:
  - QI analysis was wrong; Plaintiffs provided no clearly established law just general principles

25

Lewis v. Inocencio

- Excessive force—12(b)(6) denied
- *Monell* vs. COH—12(b)(6) granted

26

Lewis v. Inocencio, cont'd

Second, focusing on the allegation that Lockett had a concealed carry license and relying on a single line of speculation in Lewis's pleadings, the officers assert that Lockett was in fact holding a gun or, at least, armed. Lewis never alleges that Lockett was armed, pointed a gun, or fired at officers. Instead, Lewis provides a hypothetical alternative and contends that if Lockett pointed or fired a gun, he did so out of fear for his life. This hypothetical statement is permissible under Federal Rule of Civil Procedure 8(d)(2). *See Banco Cont'l v. Curtiss Nat'l Bank of Mia. Springs*, 406 F.2d 510, 513 (5th Cir. 1969). The alternative to this hypothetical—that Lockett did not assault anyone by pointing or firing a gun—suffices at this stage. *See Tuttle v. Sepolio*, 68 F.4th 969, 973–74 (5th Cir. 2023) (per curiam) (holding that the plaintiffs' excessive-force claim overcame qualified immunity where the plaintiffs alleged that "[a]ny firing done by [the decedent] ... was done purely in defense of himself and his wife"). Construing all reasonable inferences in the light most favorable to Lewis, the pleadings establish that Lockett was merely sitting in his car and later running from gunfire when the officers fatally shot him. Lewis adequately pleaded that the shooting was objectively unreasonable and clearly excessive.

27

Lewis v. Inocencio, cont'd

Tuttle Allegations

if Defendants assert in this action that Dennis knowingly shot at the officers, which Plaintiffs deny, any reasonable person would have done so under the reasonable belief that it was immediately necessary to do so to protect himself, his family, and his home against the use of greater force than was necessary by the officers and under circumstances in which any reasonable person would conclude that his home was under attack by violent criminals.

Lewis Allegations

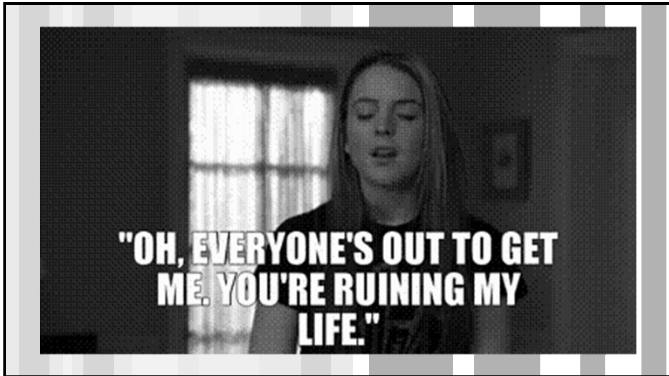
Mr. Lockett has a concealed carry license. The Defendants knew Mr. Lockett had a concealed handgun license. Mr. Lockett did not assault anyone and if he did point his gun or fire at anyone it was because he was in fear of his life from armed stranger(s) coming to kill him which they did.

28

Use of BWC in 12(b)(6)

- Sligh v. City of Conroe
  - Complaint repeatedly references BWC
  - BWC attached to 12(b)(6)
  - Considered by court
- Hodge v. Engleman
  - Plaintiff did not refer to or attach BWC to complaint
  - BWC attached to 12(b)(6)
  - Court treated dismissal as implicit conversion to MSJ
  - Affirmed b/c 10 days notice

29



30

Guerra v. Castillo

- False arrest
  - *Franks* liability survived qualified immunity
  - Castillo alleged to have pushed subordinates to file false affidavits
- Malicious prosecution
  - Not a claim in 2018/2019
- 1st Am. retaliation
  - No law re: refusal to drop charges = protected speech
- *Monell*
  - Policymaker requires "more"

31

Villareal v. City of Laredo

Graves, Circuit Judge, filed dissenting opinion, in which Circuit Judges Elrod, Higginson, Willett, Ho, and Douglas joined.

Higginson, Circuit Judge, filed separate dissenting opinion, in which Circuit Judges Elrod, Graves, Willett, Ho, Oldham, and Douglas joined.

Willett, Circuit Judge, filed separate dissenting opinion, in which Circuit Judges Elrod, Graves, Higginson, Ho, and Douglas joined.

Ho, Circuit Judge, filed separate dissenting opinion, in which Circuit Judges Elrod, Graves, Higginson, Willett, and Douglas joined.

32

Villareal v. City of Laredo

- Majority
  - Qualified immunity b/c officers had probable cause and no precedent to that point held the statute unconstitutional
  - "Taint" exception alleged in conclusions
  - Plaintiff failed to adequately plead a First Amendment retaliation claim because the officers had probable cause and she does not allege that defendants curtailed her exercise of free speech
  - 5th Cir. Does not recognize retaliatory investigation claim in 1st Amendment jurisprudence
  - 14th Am. selective enforcement—not even one other example

33

Villareal v. City of Laredo

- Dissents
  - Not actually viewing facts in favor of plaintiff
  - What is a "journalist"?
  - Who needs qualified immunity absent time pressure?

34

35

State-Created Danger

- Williams v. Williams
  - EMTs
  - No state created danger
  - We may do it later, but not in this case
- Fisher v. Moore
  - Middle school student
  - No state created danger
  - Weiner: we should

36

Espinal v. City of Houston

- Independent intermediary doctrine
  - Merely invoking “taint” exception not enough
  - To survive motion to dismiss plaintiff must allege facts supporting inference of wrongdoing
  - “all broth and no beans”

37

How pleading/proof burdens in Texas started wearing pearls and driving a BMW while the Fifth Circuit started chewing gum and riding a skateboard.

38