2015 Texas City Attorneys Association

Summer Conference – Hyatt Lost Pines Resort
June 17-19, 2015

Early Litigation Options in Municipal Litigation or *PTJ, MTD, MSJ, GTHO*

Matthew D. Durham
Assistant City Attorney
Kurt C. Banowsky
Senior Assistant City Attorney
City of Garland, Texas
200 N. Fifth Street
Garland, Texas 75040
(972) 205-2380

Early Litigation Options in Municipal Litigation
or *PTJ, MTD, MSJ, GTHO*

Matthew D. Durham
Assistant City Attorney
Kurt C. Banowsky
Senior Assistant City Attorney
City of Garland, Texas

I. INTRODUCTION

All municipalities get sued. It happens. Because of the unique history of immunity, however, municipalities have litigation options available to them that are not enjoyed by non-governmental entities. The common law rule evolved over the centuries from "the king can do no wrong," to preserving the dignity of the state, to protecting state resources. *Tooke v. City of Mexia*, 197 S.W.3d 325, 331 (Tex. 2006)(internal citations omitted).

Under common law, "no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent." *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847). Therefore, since one can only sue the government with its consent, the government can put any kind of limits on the ability to sue that it deems appropriate. Whether in the form of limitation on damages or stringent notice requirements. The idea is the same.

The purpose of this paper is to briefly examine some methods of limiting a city's exposure to liability by getting out of lawsuits as quickly as possible – without just settling everything. By no means does this paper examine every potential way to shut down litigation. Nor does the paper take an in-depth look at those topics we do discuss. Rather, in the following pages, we hope to provide the reader with a "starting point". Somewhere to get enough basics to decide if further research could prove fruitful.

II. PTJ, MTD, MSJ, GTHO

A. STATE CLAIMS

1. Removal – Can you Remove to Federal Court?

One of the first inquiries that should be made is whether the case can be removed to federal court, and, if it can, should it be removed? There are many reasons to remove a case to federal court. Federal court is often seen as more friendly to cities in some areas, such as Dallas County. Jury panels are selected district-wide rather than county-wide, often providing what is seen as a more "defendant-friendly" panel. The availability of early dismissal options, such as Rule 12 motions to dismiss, also make the federal courts a more desirable forum for lawsuit. In Texas, where state court judges are elected, federal court is often seen as less likely to be swayed by political thought or polling data. This last item can be particularly important when dealing with politically hot issues, such as police shootings. Sometimes, you may just want federal courts handling federal claims – state judges are not as familiar with federal law as federal judges.

Although not the topic of this paper, there are a just a couple of points to make regarding removal:

a. Grounds for Removal

Removal is proper if there is: (1) federal question jurisdiction (even if suit is a mixture of federal and state claims)[1]; (2) diversity jurisdiction[2]; (3) a specific statute authorizing removal (Class Actions, etc.); or (4) alienage jurisdiction. By far, in municipal litigation, the most common basis for removal of claims against a city would be federal question jurisdiction.

[1] 28 U.S.C.A. § 1331 (West).

[2] 28 U.S.C.A. § 1332 (West). Note that there is a difference between "citizen" and "resident." The allegations "must show that the citizenship of each plaintiff is different from each defendant." *Lamm v. Bekins Van Lines*, 130 F.Supp2d 1300, 1314 (M.D. Ala. 2001). Some courts have held that, [a]verments to residence are wholly insufficient for purposes of removal." *Wenger v. W. Reserve Life Assur. Co. of Ohio*, 570 F. Supp. 8, 10 (M.D. Tenn. 1983).

b. Time for Removal

A defendant must file a notice of removal within 30 days after receiving the initial suit (if removable at the time of filing) or 30 days after receiving a paper from which the defendant can first ascertain that the case is removable (if it becomes removable at some point after filing). 28 U.S.C.A. § 1446(b)(1) (West); 28 U.S.C.A. § 1446(b)(3). Note that the plaintiff's right to remand based on untimely removal may be subject to waiver. *Belser v. St. Paul Fire & Marine Ins. Co.*, 965 F.2d 5, 8 (5th Cir. 1992).

c. Time for Remand

The deadline for filing a motion to remand is generally 30 days. 28 U.S.C.A. § 1447(c) (West). This deadline does not apply, however, to remand for lack of subject-matter jurisdiction, as such a remand can be sought at any time.

2. Governmental Immunity & Basics of the Texas Tort Claims Act

a. Common Law Immunity

The doctrine of governmental immunity[3] prohibits suits against a governmental unit unless there is a clear and unambiguous constitutional or statutory waiver of that immunity.[4] It was the Texas Supreme Court that first recognized the inherent immunity of governmental units:

> In 1847, this court held that 'no State can be used in her own courts without her consent and then only in the manner indicated by that consent ….' The Court did not cite the origin of that declaration, but it appears to be rooted in an early understanding of sovereignty.
>
> *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003), judgment withdrawn and reissued (May 13, 2003), *te Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003), judgment withdrawn and reissued (May 13, 2003), (quoting *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847)).

b. Legislative Waivers of Immunity

The most well-known legislative waiver of immunity is the Texas Tort Claims Act (codified in the TEX. CIV. PRAC. & REM. CODE ANN. § 101.001 et seq. (West)(West)). Also, a limited waiver of immunity exists for written contracts for goods and services under chapter 271 of the Local Government Code. Yet another legislative waiver of immunity exists at Tex. Loc. Gov't Code Ann. § 180.006 (West); this particular section waives immunity for police and firefighter claims for benefits (*e.g.*, back pay).[5]

c. Torts

With regard to tort claims, the State and its subdivisions enjoy complete governmental immunity unless a specific waiver under the Texas Tort Claims Act exists. That is, until waived, governmental entities enjoy immunity from both suit and liability. *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976). The Texas

---

[3] *"Sovereign immunity"* and *"governmental immunity"* are related but separate concepts. As explained by the Texas Supreme court:

> Sovereign immunity refers to the State's immunity from suit and liability. In addition to protecting the State from liability, it also protects the various divisions of state government, including agencies, boards, hospitals, and universities. Governmental immunity, on the other hand, protects political subdivisions, of the State, including counties, cities, and school districts. *Tooke v. City of Mexia*, 197 S.W.3d 325, 396 n.11 (Tex. 2006) (quoting *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003) (citations omitted)).

[4] Interestingly, some scholars assert that "[s]ome of the decline in ethics in government must be attributed to the awareness of governmental officials that they generally cannot be sued for their wrongful or unethical conduct." Marilyn Phelan, *Effect of Governmental Immunity on Declining Governmental Ethics – The King Can Do Wrong!* 2007 Forum on Pub. Policy Online 3 (2007).

[5] Note that other limited waivers of immunity exist. For instance, a governmental entity that asserts affirmative claims for monetary recovery waives immunity from suit for claims against it that are germane to, connected with, and properly defensive to claims the governmental entity asserts to the extent of offset. *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006). However, this paper will only deal with the Texas Tort Claims Act.

Supreme Court has explained the differences between the two immunities:

Immunity from suit bars a suit against the State unless the State expressly gives its consent to the suit. In other words, although the claim asserted may be one on which the State acknowledges liability, this rule precludes a remedy until the Legislature consents to suit ….

Immunity from liability protects the State from judgments even if the Legislature has expressly given consent to the suit. In other words, even if the Legislature authorizes suit against the State the question remains whether the claim is one for which the State acknowledges liability. The State neither admits liability by granting permission to be sued. *Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997)(citations omitted); *State v. Lueck*, 290 S.W.3d 876 (Tex. 2009) ("[i]mmunity from suit is a jurisdictional question of whether the State has expressly consented to suit …. On the other hand, immunity from liability determines whether the State has accepted liability even after it has consented to suit"); *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009)("[g]overnmental immunity, like the doctrine of sovereign immunity to which it is appurtenant, involves two issues: whether the State has consented to suit and whether the State has accepted liability").

As stated by the Austin Court of Appeals, municipalities and other political subdivisions "may not be sued **or** held liable for the torts of its agents in the absence of a constitutional or statutory provision that waives [their] governmental immunity for alleged wrongful acts." *Texas Parks & Wildlife Dep't v. Davis*, 988 S.W.2d 370, 372 (Tex. App.—Austin 1999, no pet.) (emphasis added). Thus, a plaintiff must establish both a waiver of immunity from suit **and** liability in order to successfully pursue to judgment a tort claim against a municipality.

Furthermore, the Texas Tort Claims Act is a limited waiver of immunity, not a general one. *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998). In other words, the Act does not abolish governmental immunity for torts across the board; rather, it waives governmental immunity only in certain circumstances that are defined by the Act. *Id. see also Univ. of Texas Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994); *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996). The Texas Tort Claims Act's limited waiver of immunity is as follows:

A governmental unit in the state is liable for:

(1) property damage, personal injury and death proximately caused by the wrongful acts or omissions or the negligence of an employee acting within the scope of employment if:

  (A) the property damage, personal injury or death arises from the operation or use of a motor driven vehicle or motor driven equipment; and

  (B) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West).

Thus, all three damage types contemplated by the Act – property damage, personal injury, and death – are recoverable if caused by a motor driven vehicle or piece of motor driven equipment. But, only damages resulting from personal injury or death are recoverable if caused by real property or the use of tangible personal property. Property damage caused by real property or personal property is not recoverable.

d. What *Isn't* Waived?

There is no waiver of governmental immunity for intentional torts. TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(2) (West). Also, the Act preserves immunity for discretionary acts under the "discretionary powers" exception to the waiver. TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (West). The discretionary function exception is limited to the exercise of governmental discretion and does not apply to the exercise of non-governmental discretion such as professional or occupational discretion. *Christilles v. Sw. Texas State Univ.*, 639 S.W.2d 38, 42 (Tex. App. 1982) *disapproved of by Texas A & M Univ. v. Bishop*, 156 S.W.3d 580 (Tex. 2005). The purpose of the discretionary powers exception to the waiver is to avoid judicial review or interference with those policy decisions committed to the other branches of government. *State v. Terrell*, 588 S.W.2d 784, 787 (Tex. 1979).

In fact, numerous exceptions to the waiver are listed at TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.051-101.061 (West). (*e.g.*, section 101.055(2) excepts from

waiver those actions arising from a governmental employee's response to an emergency call). This list, of course, should be double-checked upon suit.

3. Specific Waivers of Immunity Provided by the Texas Tort Claims Act

a. Waiver of Immunity: Motor Driven Vehicles and Equipment

As stated above, the Legislature has waived governmental immunity with regard to claims for damage arising from the operation or use of a motor driven vehicle (*e.g*., car accident) or some other piece of motor driven equipment (*e.g*., tools or machinery). The elements of a successful motor driven vehicle or equipment claim under the Act are: (1) property damage, personal injury, or death; (2) proximately caused by (3) the wrongful acts or omissions or the negligence of an employee of the governmental entity; (4) acting within the scope of his or her employment; if (a) the property damage, personal injury, or death arises from the operation or use of a motor driven vehicle or motor driven equipment; and (b) the employee would be personally liable to the claimant under Texas law. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1).

What it means to *operate* or *use* motor driven equipment in the performance of governmental functions has been the subject of numerous opinions. "'[O]peration' refers to 'a doing or performing of a practical work,' … and 'use' means 'to put or bring into action or service; to employ for or apply to a given purpose' …." *Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg By & Through Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989). For such liability to attach, the use of the vehicle "'must have actually caused the injury.'" *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 543 (Tex. 2003) (citing *Texas Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 869 (Tex. 2001)(holding that a stationary electric motor-driven pump was indeed "motor driven equipment" under the Texas Tort Claims Act)).

The operation or use of a motor vehicle "'does not cause injury if it does no more than furnish the condition that makes the injury possible.'" *Id.* (citing *Bossley*, 968 S.W.2d at 343; *City of Kemah v. Vela*, 149 S.W.3d 199 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (illegally parked police car merely furnished the condition that made backseat passenger's injuries possible). Governmental immunity is not waived if the vehicle is "nothing more than the place" where the injury occurred.[6] *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992); *Sepulveda v. Cnty. of El Paso*, 170 S.W.3d 605, 611-612 (Tex. App.—El Paso 2005, no pet.).

In addition, recall that section 101.021 of the Act states that the governmental employee's act creates liability for the governmental entity only if "the employee would be personally liable to the claimant according to Texas law." For instance, when "the employee is protected from liability by official immunity, the employee is not personally liable to the claimant and the government retains … its immunity." *DeWitt v. Harris County*, 904 S.W.2d 650, 653 (Tex. 1995) (citing *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994), and *City of Houston v. Kilburn*, 849 S.W.2d 810, 812 (Tex. 1993)). Thus, if the judge or jury determines that the employee is not liable to the injured party, the governmental unit cannot be held liable. *Carpenter v. Barner*, 797 S.W.2d 99 (Tex. App. – Waco 1990, writ denied) (peace officer was entitled to qualified immunity; thus, his governmental employer could not be liable), *overruled on other grounds by Travis v. City of Mesquite*, 830 S.W.2d 94 (Tex. 1992)

b. Waiver of Immunity: Condition or Use of Real Property

The Legislature, through the Texas Tort Claims Act, has provided a limited waiver of immunity for tort claims providing that a governmental unit is liable for "personal injury and death so caused by a condition or use of tangible personal property or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2). A tort claim for a "condition or use of real property" may arise from either an *ordinary premises defect* or a *special defect*, depending on the condition of the property. *Id.* at § 101.022. Whether a condition is ordinary or special determines the

[6] To be clear, the mere fact that a car, bus, or any sort of motor driven equipment is involved does not mean that immunity is waived by Texas Tort Claims Act. On multiple occasions, Texas courts have held that the municipal vehicle involved was simply the physical setting of the injury, *i.e*., its use or operation did not cause the injury. *See Hopkins v. Spring Indep. Sch. Dist.*, 736 S.W.2d 617 (Tex. 1987) (cerebral palsy-stricken student suffered severe concussions while on the bus); *Garza's Estate v. McAllen Indep. Sch. Dist.*, 613 (S.W.2d 526 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.) (high school student stabbed to death on the bus presented a failure-to-control claim, not a tort claim).

governmental unit's standard of care. *Id.* The Act explains the distinction as follows:

(a) Except as provided in Subsection (c), if a claim arises from a premise defect, the governmental unit owes the claimant only the duty that a private person owes a licensee on private property, unless the claimant pays for the use of the premises.

(b) The limitation of duty in this section does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads, or streets ….

(c) If a claim arises from a premise defect on a toll highway, road, or street, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property.

Id. Courts determine whether to classify a condition as a premises defect or a special defect on a case-by-case basis. *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992) (op. on reh'g). "The class of special defects contemplated by the statute is narrow." *The Univ. of Texas at Austin v. Hayes*, 327 S.W.3d 113, 116 (Tex. 2010). While the Legislature does not define "special defect" in the Act, it does liken them to conditions "such as excavations or obstructions on highways, roads, or streets …." TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(b) (West).

(1) Licensee Standard/Premise Defect

In a claim based on the condition or use of real property, the governmental landowner generally owes the same duties that a private landowner owes to a licensee. TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a) and (c); *City of Grapevine v. Roberts*, 946 S.W.2d 841, 843 (Tex. 1997). The licensee standard of care requires a landowner not to injure a licensee by willful, wanton, or grossly negligent conduct and to use ordinary care to warn or make reasonably safe a dangerous condition of which the owner has actual knowledge and of which the licensee is not aware. *State Dep't of Highways & Pub. Transp.*, 838 S.W.2d at 235, 237.[7]

(2) Invitee Standard/Special Defect

The standard of care is different if the plaintiff bases his or her claim on a special defect or otherwise invokes the invitee status. *See, e.g., City of Houston v. Rushing*, 7 S.W.3d 909, 914 (Tex. App.—Houston [1st Dist.] 1999 (describing the invitee standard applicable to special defect cases). Under the invitee standard of care, the governmental unit the following standard of care to the invitee: (1) the duty to maintain the premises in a reasonably safe condition; (2) the duty of reasonable care to inspect and discover a condition involving an unreasonable risk of harm; (3) the duty to protect against danger and to make safe any defects or to give adequate warning thereof. *Id.* The duty owed is to exercise reasonable care to protect against danger from a condition on the land that creates an unreasonable risk of harm of which the owner or occupier knew or by the exercise of reasonable care would discover. *State ex rel. Tex. Dept. of Parks and Wildlife v. Shumake*, 131 S.W.3d 66 (Tex. App.—Austin, 2003), *aff'd sum nom. State v. Shumake*, 199 S.W.3d 279 (Tex. 2006).

(3) When to Warn?

Under the licensee standard of care, a plaintiff must prove that the governmental unit had *actual knowledge* of a condition that created an unreasonable risk of harm, and also that the licensee did not have actual knowledge of that same condition. *Texas Dep't of Transp. v. York*, 284 S.W.3d 844, 847 (Tex. 2009)(*per curiam*); *see also State v. Tennison*, 509 S.W.2d 560, 562 (Tex. 1974) ("Actual knowledge rather than constructive knowledge of the dangerous condition is required"). The invitee standard is more lenient. Under the invitee standard, a plaintiff need only prove that the governmental unit should have known of a condition that created an unreasonable risk of harm. *Id.*

Thus, *actual knowledge* is an essential element of a premise defect claim. *Payne*, 838 S.W.2d at 237; *Tennison*, 509 S.W.2d at 562. Plaintiff must prove that the City possessed actual knowledge of the condition on the subject property "'at the time of the accident, not merely [knowledge] of the possibility that a dangerous condition c[ould] develop over time.'" *City of Corsicana v. Stewart*, 249 S.W.3d 412, 413-14, 416 (Tex. 2008)(per curiam) (quoting *City of Dallas v. Thompson*, 210 S.W.3d 601, 603 (Tex. 2006)). In determining whether a premise owner has actual knowledge, "courts generally consider whether the premise owner has received reports of prior injuries or reports of the potential danger presented by the condition." *City of Dallas v. Reed*, 258 S.W.3d 620, 622 (Tex. 2008))

[7] The duty of the governmental unit in a premise defect case is defined as being the duty a private person owes to a licensee on private property unless the injured party paid for use of the premises. *Payne*, 838 S.W.2d at 237 n.1 (emphasis added). A party that pays for the use of a governmental premise is entitled to invitee status. *See, e.g., Simpson v. Harris County*, 951 S.W.2d 251, 252-53 (Tex. App.—Houston [14th Dist.] 1997, no writ).

(quoting *Univ. of Tex.– Pan Am. v. Aguilar*, 251, S.W.3d 511 (Tex.2008) (per curiam)).

(4) Plaintiff Required to Show Government Ownership or Control

In order to prove these "condition of property" claims under the Texas Tort Claims Act, the plaintiff must establish that the governmental unit was a possessor of the premises at the time of the injury. *City of San Antonio v. Hartman*, 155 S.W.3d 460, 465 (Tex. App.—San Antonio 2004), *rev'd on other grounds*, 201 S.W.3d 667 (Tex.2006). If an entity does not own, operate, or maintain the premises where the plaintiff was injured, it cannot be held liable for a defect on the premises. *See Gunn v. Harris Methodist Affiliated Hosps.*, 887 S.W.2d 248, 251-52 (Tex. App.—Fort Worth 1994, writ denied).

c. Waiver of Immunity: Use of Tangible Personal Property

Pursuant to the Texas Tort Claims Act, a governmental unit is liable for personal injury so caused by the use of tangible personal property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.[8] TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2). Allegations of negligent conduct alone against a governmental unit are not sufficient to state a cause of action within the waiver of sovereign immunity provisions of the TTCA. *See Velasquez v. Jamar*, 584 S.W.2d 729 (Tex. Civ. App.—Tyler 1979, no writ); *see also Dallas Cnty. Mental Health and Mental Retardation v. Bossley*, 968 S.W.2d 339, 342-43 (Tex.), cert denied, 525 U.S. 1017, 119 S.Ct. 541, 142, L.Ed.2d 450 (1998). A cause of action does not exist merely "whenever a government employee and a piece of tangible property are combined." *Velasquez*, 584 S.W.2d at 732.

Section 101.021(2) waives immunity for claims based upon the use of tangible personal property only when the governmental unit itself uses the property. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2); *San Antonio State Hosp. v. Cowan*, 128 S.W.3d 244, 245-46 (Tex. 2004) (liability not waived where governmental unit provided claimant with items used by claimant to cause his own death). The Texas Supreme Court has "consistently defined 'use' to mean 'to put or bring into action or service; to employ for or apply to a given purpose.'" *Cowan*, 128 S.W.3d at 246 (citations omitted). Merely "providing, furnishing, or allowing access to tangible property" does not constitute a "use" under the Act. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 98 (Tex. 2012) (liability not waived where governmental unit provided access to items used by claimant to cause his own death). "Immunity is not waived when the governmental unit merely 'allow[s] someone else to use the property and nothing more.'" *Dallas Cnty. v. Posey*, 290 S.W.3d 869, 871 (Tex. 2009) (quoting *Cowan*, 128 S.W.3d at 246).

4. Responding to a Suit Against Your Governmental Client – Things to Consider.

a. Contesting Subject Matter Jurisdiction

The Texas Supreme Court has established a procedure for contesting subject matter jurisdiction that involves the merits of the claim. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004). A plea to the jurisdiction contests a trial court's authority to determine the subject matter of a cause of action. *Texas Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999)(per curium); *Tex. Parks & Wildlife Dep't v. Garrett Place, Inc.*, 972 S.W.2d 140, 142-43 (Tex. App.–Dallas 1998, no writ). Subject matter jurisdiction is essential to the authority of a court to decide a case. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000). Whether a court has subject matter jurisdiction is a question of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Lack of subject matter jurisdiction makes a judgment void, not just voidable. *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990); *Dubai Petroleum. Co. v. Kazi*, 12 S.W.3d 71, 74-75 (Tex.2000) (without subject matter jurisdiction, a court cannot render a valid judgment). "Subject matter jurisdiction is never presumed and cannot be waived." *Cont'l Coffee Products Co. v. Cazarez*, 937 S.W.2d 444, 448 n.2 (Tex. 1996)(citing *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993)). Because subject matter jurisdiction is essential to the authority of a court to decide a case and cannot be waived, the issue may be raised at any time, including for the first time on appeal. *See Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000)(citing *Texas Ass'n of Bus.*, 852 S.W.2d, 445.

When a plea to the jurisdiction challenges the existence of jurisdictional facts, the court is to consider the relevant evidence submitted by the parties when it is necessary to resolve the jurisdictional issues. *Tex. Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex.

[8] Note that the Texas Supreme Court has held that the mis-use of information, especially as it relates to the mis-use of information found in medical records, does not amount to mis-use of tangible personal property. *University of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175 (Tex. 1994).

2004). This procedure generally mirrors that of a summary judgment. *Id.* at 228. The plaintiff has the burden to plead facts affirmatively showing the trial court has subject matter jurisdiction. *Id.* at 226. The governmental unit then has the burden to assert that the trial court lacks subject matter jurisdiction. *Id.* at 228. If it does so, the plaintiff must raise a material fact issue regarding jurisdiction to survive the plea to the jurisdiction. *Id.* at 228.

b. Failure to Provide Statutory Notice is a Jurisdictional Defect

The Texas Tort Claims Act has several limitations on its applicability. In order for the waiver of immunity for liability contained in the Tort Claims Act to apply, it is first necessary that a potential plaintiff comply with the notice provision of the statute. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995).

The notice provision states in part:

§101.101. Notice

(a) A governmental unit is entitled to receive notice of a claim against it under this chapter not later than six months after the day that the incident giving rise to the claim occurred. The notice must reasonably describe:

(1) the damage or injury claimed;
(2) the time and place of the incident; and
(3) the incident.

(b) A city's charter and ordinance provisions requiring notice within a charter period permitted by law are ratified and approved.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.101 (West). The purpose of the notice requirement of the Tort Claims Act is to ensure prompt reporting of claims in order to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995); *City of Houston v. Torres*, 621 S.W.2d 588, 591 (Tex. 1981).

The notice requirement has some unique history. In *Univ. of Texas Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 364 (Tex. 2004), the Supreme Court concluded that this notice provision, while mandatory and a potential bar to any action under the Tort Claims Act, was not a condition of the Act's waiver of immunity. After *Loutzenhiser*, the Legislature amended section 311.034 of the Code Construction Act to make notice, and other statutory prerequisites, jurisdictional, that is, a condition of the Act's waiver of immunity from suit. *See* Act of June 1, 2005, 79th Leg., R.S. ch. 1150, 2005 Tex. Gen. Laws 3783. Further, it should be noted that the statutory notice does not have to be pre-suit notice. If the claimant's lawsuit provides all the requisite information and is served within six months of the incident made the basis of the suit, the notice provision is satisfied. *Colquitt v. Brazoria Cnty.*, 324 S.W.3d 539 (Tex. 2010).

Finally, be leery of claimants that attempt to satisfy the notice requirement through police reports or other investigative reports. In *City of Dallas v. Carbajal*, 324 S.W.3d 537 (Tex. 2010), the Supreme Court analyzed a police report that stated the plaintiff drove her vehicle into a gap in the street that "was not properly blocked." *Id.* at 538. After reviewing the evidence, the Supreme Court ruled that the police report was no more than a routine safety investigation and, therefore, it failed to provide the City of Dallas with actual notice of its alleged fault in causing the accident. *Id.* at 539. "When a … report does not indicate that the governmental unit was at fault, the governmental unit has little, if any, incentive to investigate its potential liability because it is unaware that liability is even at issue." *Id.*

c. One More Warning – Look for Proper Service

In a suit against an incorporated municipality, citation may only be served on the municipality's mayor, clerk, secretary, or treasurer. TEX. CIV. PRAC. & REM. CODE ANN. § 17.024 (West). Citation addressed to anyone else, including the City Attorney for an incorporated municipality, is not proper. *See Skaggs v. City of Keller*, 880 S.W.2d 264, 226 (Tex. App. - Fort Worth 1994, writ denied); *City of Mesquite v. Bellingar*, 701 S.W.2d 335, 336 (Tex. App. - Dallas 1985, no writ) ("The citation of process was directed to Elland Archer, Mesquite City Attorney .... The City contends that Archer was not an authorized agent for service ... because he was not the mayor, clerk, secretary or treasurer of the City. We agree with the City").

5. When The Plaintiff Sues a City Employee – §101.106

Under Section 101.106 of the Texas Tort Claims Act, recovery against an individual employee is barred in three instances: (1) when suit is filed against the governmental unit only; (2) when suit is filed against both the governmental unit and its employee; or (3) when suit is filed against an employee whose conduct was within the scope of his employment. *Mission Consol. Indep. Sch.*

Dist. v. Garcia, 253 S.W.3d 653, 657 (Tex. 2008)(emphasis added).

Upon the filing of a claim under the Act, the plaintiff makes an election of remedies. If the plaintiff sues only the city, then any claim against the employee is "immediately and forever" barred. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a) (West). Furthermore,

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f).

Often, under the theory of "sue the all and let the judge sort them out," a plaintiff will sue both the city and a city employee. When this happens, you can get the employee dismissed right out of the gate. The Texas Tort Claims Act states that:

> If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(e). It is merely a matter of filing the motion. Under Section 101.106 of the Texas Tort Claims Act, recovery against an individual employee is barred in three instances: (1) when suit is filed against the governmental unit only; (2) when suit is filed against both the governmental unit and its employee; or (3) when suit is filed against an employee whose conduct was within the scope of his employment. *Mission Consolidated Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 657 (Tex. 2008) (emphasis added).

On the other hand, if the plaintiff sues the employee only, then any claim against the city is "immediately and forever" barred. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(b).

Furthermore, even if the plaintiff alleges intentional torts – which are not covered by the Tort Claims Act, such claims are considered "filed under" the Texas Tort Claim Act. *Singleton v. Casteel*, 267 S.W.3d 547, 553-54 (Tex. App. – Houston [14th Dist.] 2008, pet denied)("[Plaintiff's] contention that §101.106(e) does not apply because his tort claims against the officers are [intentional torts and] not ones for which the [Texas Tort Claim Act] has waived immunity, and thus were not 'filed under' the [Texas Tort Claims Act], is without merit.").

B. FEDERAL CLAIMS

While there are many ways to find yourself in federal court, when representing a city, you are likely facing one of two claims in federal court: (1) a claim under Section 1983; or (2) an employment law claim.

1. Federal Courts are Looking for Reasons to Dismiss Cases – Find One!

Federal judges like to move cases along. By "along," they mean off their dockets. The job of the city attorney is to give the judge a reason to dismiss the case. Early. The earlier, the better. "It is incumbent on all federal courts to dismiss an action whenever it appears that subject matter jurisdiction is lacking." *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998).

2. Note to Self: Defenses that Must Be Included in Any Pre-Answer Motion

Certain defenses must be included in the pre-answer motion. They are: (1) lack of personal jurisdiction; (2) improper venue; (3) insufficient form of process; (4) insufficient service of process; (5) vague or ambiguous pleading; (6) redundant, immaterial, impertinent or scandalous materials. Fed. R. Civ. P. 12(h).

3. Before We get to the Merits – Pre-Answer Motions

a. Delaying the Inevitable Part I – Staying the Case

While this is not an "out" in that the case does not disappear, a delay in litigation pending a criminal trial gives the city a chance to gather evidence or may otherwise benefit the municipal defendant(s).

A common Section 1983 complaint is that officers used excessive force in effectuating an arrest. At times, a plaintiff may still have the criminal case pending. A stay pending the outcome of the criminal trial may have a huge

impact on what discovery can be conducted. If, for whatever reason, the plaintiff does not seek a stay pending the outcome of his criminal case, the city should not push the issue. Rather, the city attorney should be prepared to use the plaintiff's choice to the advantage of the city.

For example, in deposition, the plaintiff will have two choices: testify fully (and presumably, truthfully) or plead the fifth. "While a person may refuse to testify during civil proceedings on the grounds that his testimony might incriminate him, his refusal to testify may be used against him in a civil suit." *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 673-74 (5th Cir. 1999). Thus, "adverse inferences" are allowed against "parties to a civil action when they refuse to testify in response to probative evidence offered against them..." *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976).

On the other hand, there are times when an officer has been charged with a crime related to an excessive force claim. The officer is entitled to a stay of proceedings while the threat of criminal prosecution exists. Indeed, in most cases, the officer should seek a stay, if for no other reason than to avoid the harmful effects of pleading the Fifth. When the officer pleads the Fifth, it creates problems for the city.

A district court may stay a civil action during the pendency of a parallel criminal proceeding in order to avoid substantial and irreparable prejudice. *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983). The court should consider the following factors in determining whether to stay the civil action: (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the criminal case; (3) the private interests of the plaintiff(s) in proceeding expeditiously, weighed against the prejudice to the plaintiff(s) cause by the delay; (4) the private interests and burden on the defendant(s); (5) the interests of the courts; and (5) the public interests. *S.E.C. v. Offill*, Civ. Action No. 3:07-CV-1643-D, 2008 WL 958072, *2 (N.D. Tex. Apr. 9, 2008).

(1) The Extent to Which the Issues in the Criminal Case Overlap with Those Presented in the Civil Case

This is important due to the risk of self-incrimination. The risk is higher if the facts in the civil action and the facts in the criminal matter significantly overlap. *Heller Healthcare Finance, Inc. v. Boyes*, Civ. Action No. 3:00-CV-1335-D, 2002 WL 1558337 *2 (N.D. Tex. Jul. 15, 2002).

(2) The Status of the Criminal Case

Generally, the risk of self-incrimination is higher post-indictment. Prior to indictment, the question of whether the issues overlap is generally a matter of speculation. *Alcala v. Texas Webb Cnty.*, 625 F. Supp. 2d 391 (S.D. Tex. 2009). Therefore, courts will often decline to stay a case pre-indictment. However, even when an indictment has not come down, a stay may still be appropriate. *SEC v. Amerifirst Funding, Inc.*, Civ. Action No. 3:07-CV-1188-D, 2008 WL 866065 *3 (N.D. Tex. Mar. 17, 2008).

(3) The Private Interests of the Non-indicted Party in Proceeding Expeditiously, Weighed Against the Prejudice to Such Party Cause by the Delay

Normally, in evaluating a [non-indicted party's] burden resulting from the stay, "courts may insist that the [non-indicted party] establish more prejudice than simply a delay in his right to expeditiously pursue his claim." *Whitney National Bank v Air Ambulance ex rel. B&C Flight Mgmt., Inc.*, 2007 WL 1468417 at *2 (S.D. Tex. May 18, 2007).

(4) The Private Interests and Burden on the Criminal Defendant(s)

Absent a stay, a criminal defendant faces a conflict between asserting his or her Fifth Amendment rights and defending a civil action. In particular, if the criminal defendant is required to answer interrogatories, provide deposition testimony, or otherwise participate in discovery, he or she would risk creating evidence that could be used against him or her in a criminal prosecution. A stay eliminates this conflict. *Heller Healthcare Finance, Inc. v. Boyes*, Civ. Action No. 3:00-CV-1335-D, 2002 WL 1558337 *2 (N.D. Tex. Jul. 15, 2002).

(5) The Interests of the Courts

The Courts have an interest in moving dockets. This can cut both ways. A court may deny a stay in order to move a case along. Or, a court may stay the civil case in the hope of it going away. "The conviction of a civil defendant as a result of the entry of a plea or following a trial can contribute significantly to the narrowing of issues in dispute in the [] civil case." *In re Worldcom, Inc. Sec. Litig.*, Civ. Action No. 02-CIV-3288 (DLC), 2002 WL 31729501, at *8 (S.D.N.Y. Dec. 5, 2002). Therefore, the court may wish to analyze to what extent the matters before it will be "streamlined" if it awaits the conclusion of the civil trial.

(6) The Public Interests

Staying a civil case between two parties in which one party is seeking monetary damages may seem to have little, if any affect on the public interest. The public does, however, have an interest in the resolution of civil disputes with minimal delay, but "only to the extent that the integrity of the defendant's rights can be maintained." *St. Martin v. Jones*, 2008 WL 453439 *3 (E.D. La. Oct. 2, 2008).

b. Delaying the Inevitable Part II – the SCRA

If one or more of the officers involved in a lawsuit are former military, it is possible that it may become necessary to invoke the protections of the Servicemembers Civil Relief Act (the "SCRA"). The SCRA was passed in 2003, in response to the increased demands placed on military personnel as a result of the wars in Iraq and Afghanistan. The SCRA implemental substantial amendments to the Soldiers' and Sailors' Civil Relief Act of 1940 for the purpose of allowing the members of the military to "devote their entire energy to the defense needs of the Nation." P.L. 108-189, December 19, 2003, 117 Stat. 2835, Sec. 2).

The SCRA provides that upon application of an active-duty servicemember, the Court shall stay the action if the servicemember comes forward with communications which "state the manner in which current military duty requirements materially affect the servicemember's ability to appear." 50 U.S.C. App. §522(b)2A. The application should also include a communications from the servicemembers' commanding officer stating that the servicemember's currently military duty prevents appearance and that military leave is not authorized for the servicemember at the present time. 50 U.S.C. App. §522(b)2B.

The main issue with an active-duty servicemember as a defendant is that defendant's unavailability to assist his or her attorneys in the preparation of the case. Although communications technology has advanced quite a bit, reliable communications with members of the military is spotty, at best. Consequently, should an individual defendant be called to active duty, his or her attorney should seek a stay, unless the situation would, without a doubt, not affect the defendant's ability to defend the case.

Furthermore, even if the delay in the case would affect the plaintiffs in some way, the court should still stay the case. The Act is to be administered as an instrument to accomplish "substantial justice." *Hunt v. United Auto Workers Local 1762*, Civ. Action No. 4:04-CV-02304, 2006 WL 572805 *1 (E.D. Ark., Mar. 7, 2006). Substantial justice may result in a detriment to those who are not in military service. *Id.* However, a stay will be granted, in spite of the probability that plaintiff(s) may suffer by not being able to prosecute their claims in the courts and the sacrifice is one of those which must be made in war for the common good. *Id.*

c. Correcting the Plaintiff's Pleading Mistakes

Some pleading issues are usually resolved with an amended complaint. Most, if not all, courts will grant a plaintiff an opportunity to amend before dismissing with prejudice. *Arthrocare Corp. v. Smith & Nephew, Inc.*, 406 F.3d 1365, 1370 (Fed. Cir. 2005).

(1) Dismissing the Individual Defendant(s) – Official Capacity Suits

An official capacity claim is merely another way of pleading an action against a city. *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). Therefore, if the claims asserted against the individual defendants are merely duplicative of the claims asserted against the city, such claims should be dismissed. *Castro Romero v. Becken*, 256 F.3d 349 (5th Cir. 2001)(finding dismissal of claims against individual defendants in their official capacities appropriate when the allegations duplicate claims against the governmental entity).

(2) Suits Against Non-Jural Entities

Plaintiffs often file a lawsuit against a police department itself. Most, if not all, police departments are non-jural entities and, as such, cannot be sued. The proper party is the city itself. A plaintiff may not bring a civil rights action against a servient political agency or department unless such agency or department enjoys a separate and distinct legal existence. *Darby v. Pasadena Police Dep't*, 939 F.2d 311, 313–14 (5th Cir.1991). In *Darby*, the Fifth Circuit held that "unless the true political entity has taken explicit steps to grant the servient agency with jural authority, the agency cannot engage in any litigation except in concert with the government itself." *Id.* at 313. A city police department is not a jural entity subject to suit. See, e.g ., *Williams v. City of Dallas Police Dep't*, No. Civ. Action No. 3:09–CV–0275–P, 2009 WL 812239, at *2 (N.D.Tex. Mar.26, 2009) (accepting recommendation of Mag. J.); *Edwards v. Dallas County*

Jail Med. Dep. Civ. Action No. 3:07–CV–0886–G, 2007 WL 2687615, at *2 (N.D.Tex. Sept.13, 2007).

(3) Failure to Identify a Decision-Maker

Municipal liability under Section 1983 requires proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose "moving force" is the policy or custom. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). See, *e.g.*, *Davenport v. City of Garland*, Civ. Action No. 09–CV–798–B, 2010 WL 1779620, *2–3 (N.D.Tex.2010) (Stickney, M.J.) report and recommendation adopted, 3:09-CV-798-B, 2010 WL 1779619 (N.D. Tex. Apr. 20, 2010)(finding that the plaintiff failed to name any final policymaker or allege any facts which would allow the court to make that determination). Furthermore, it is not sufficient to merely allege in a conclusory fashion, that certain policymakers, "were aware that their custom and/or policy of condoning and tolerating..." the alleged wrong. Rather, the plaintiff must set forth specific allegations that the policymaker(s) had actual or constructive knowledge of the alleged policy or custom. *Wright v. City of Garland*, 3:10-CV-01852-D (N.D. Tex. Nov. 13, 2014).

(4) *Schultea* Reply – Tell Us More

The doctrine of qualified immunity shields government officials acting withing their discretionary authority from liability when their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known. *Wallace v. Cnty. of Comal*, 400 F.3d 284, 289 (5th Cir. 2005). Qualified immunity protects public officials "not simply from liability, but also from standing trial." *Johnson v. Jones*, 515 U.S. 304, 312, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995).

However, sometimes, it is difficult to fully evaluate the availability of the defense of qualified immunity without more detail than the plaintiff's original pleadings provide. In such a circumstance, the defendant can ask for a reply pursuant to Fed. R. Civ. P. 7(a)(7). "When a public official pleads the affirmative defense of qualified immunity in his answer, the district court ... may required the plaintiff to reply to that defense in detail. By definition, the reply must be tailored to the assertion of qualified immunity and fairly engage its allegations." *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995).

Generally, this appears to be something to expect from the court *sua sponte*. *Allen v. Burnett,* 3:12-CV-04863-O-BH (Apr. 25, 2009). The City of Garland has filed motions to require a *Schultea* reply. The motions have been granted. *Elizondo v. City of Garland, et al.*, 3:09-CV-1103-O (Dec. 31, 2009).

When a plaintiff fails to set forth, in detail, the conduct of the public official that fairly meets the standards set forth above, setting forth more than merely conclusory allegations that the official, "violated clearly established rights" then the Court could require the Plaintiff to file a new pleading, directly addressing the officer's defense of qualified immunity.

d. Dismissing the Claim – When Repleading is Futile

The Court need not grant leave to amend if it would be futile to do so. *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004); *Alhamzawi v. State of Texas (Garland, Texas)*, 3:12-CV-01237-L-BF, 2014 WL 1017055 (N.D. Tex. Mar. 14, 2014).

(1) *Respondeat Superior* Liability (or the Lack Thereof)

Although municipalities are considered "persons" under Section 1983, they cannot be held liable simply on a theory of *respondeat superior*. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 688-89, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). It is insufficient to simply allege that the city's employees did wrong, therefore the city is responsible. Rather, liability only attached "when execution of a government's policy or custom, whether make by its lawmakers or those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id*. At 694. *Wright v. City of Garland*, No. 3:10-CV-1852-D, 2014 WL 5878940(N.D. Tex. Nov. 13, 2014).

(2) When Plaintiff Lacks Standing

"Standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "To establish standing, a plaintiff must meet both constitutional and prudential requirements." *Wilbert Family Ltd. v. Dallas Area Rapid Transit*, No. 3:10-CV-2052-D, 2012 WL 246091, *3 (N.D. Tex. Jan. 26, 2012)(citing *Harold H. Huggins Realty, Inc. v. FNC, Inc*., 634 F.3d 787, 795 n.2 (5th Cir. 2011).

i. Constitutional Standing – Rule 12(b)(1)

It is well settled that unless a plaintiff has standing, a federal district court lacks subject matter jurisdiction to address the merits of the case. Constitutional standing is "an essential and unchanging

part of the case-or-controversy requirement of Article III." *Alhamzawi v. Sate of Texas (City of Garland)*, No. 3:12-CV-01237-L-BF, 2014 WL 1017055 *3 (N.D. Tex. Feb. 26, 2014). "Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, lack the power to adjudicate claims." *Stockman*, 138 F.3d, 151. In the absence of standing, there is no "case or controversy" between the plaintiff and defendant which serves as the basis for the exercise of judicial power under Article III of the Constitution. *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). The key question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant federal court jurisdiction. *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Consequently, Constitutional standing is a Rule 12(b)(1) issue. *Wilbert Family Ltd. v. Dallas Area Rapid Transit*, No. 3:10-CV-2052-D, 2012 WL 246091, at *3 (N.D. Tex. Jan. 26, 2012)(citing *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 560 (5th Cir. 2001) *abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (U.S. 2014).

Constitutional standing is composed of three elements: (1) the plaintiff must have suffered an actual or imminent injury which is concrete and particularized, and may not be conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *United States v. Hays*, 515 U.S. 737, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995).

ii. Prudential Standing – Rule 12(b)(6)

In contrast to Constitutional standing, which is a 12(b)(1) issue, prudential standing is an issue properly considered under Rule 12(b)(6). *Blanchard 1986, Ltd. v. Park Plantation, LLC*, 553 F.3d 405, 409 (5th Cir. 2008). In determining whether prudential standing exists, a court considers the following: (1) whether a plaintiff's grievance arguably falls within the zone of interested protected by the statutory provision invoked in the suit; (2) whether the complaint raises abstract questions or a generalized grievance more properly addressed by the legislative branch; and (3) whether the plaintiff is asserting his own legal rights and interests rather than the legal rights and interests of third parties. *Encompass Office Solutions, Inc. v. Connecticut Gen. Life Ins. Co.*, Civ. Action No. 2:11-CV-2487-L, 2013 WL 1194392 *5 (N.D. Tex. Mar. 25, 2013)(citing *St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 539 (5th Cir. 2009).

(3) When the Plaintiff Has Been Bad – Heck v. Humphrey

In *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), the United Sates Supreme Court held that a civil tort action, including an action under Section 1983, is not an appropriate vehicle for challenging the validity of criminal proceedings. When a plaintiff brings an action against his/her arresting officers, the court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence. For example, a conviction for assault on a public servant may bar an action for a claim of excessive force against the arresting officer (assuming the arresting officer was the assaulted public servant).

Furthermore, a deferred adjudication does not eviscerate the effectiveness of the *Heck* defense. The Fifth Circuit, in *DeLeon v. City of Corpus Christi*, 488 F.3d 649 (5th Cir. 2007), after lengthy consideration of Texas criminal law and the Supreme Court's decision in Heck, concluded that "a deferred adjudication order is a conviction for the purposes of Heck's favorable termination rule," and barred the plaintiff's section 1983 claims as a result of his deferred adjudication on the claim of aggravated assault on the police officers he was suing.

4. The Merits "Light" – Twombley/Iqbal/Evans

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to move for dismissal of the plaintiff's pleadings on the grounds that the complaint fails to state a claim for which relief may be granted. In ruling on a 12(b)(6) motion, the Court must assume all material facts contained in the complaint are true and must indulge all inference in favor of the plaintiff. *Doe v. Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1401 (5th Cir. 1996), reh'g en banc granted, opinion vacated (June 17, 1996), *on reh'g en banc*, 113 F.3d 1412 (5th Cir. 1997). The Court need not accept as true, however, allegations that are conclusory in nature. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). A plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The allegations must raise a right to relief above the mere speculative level. *Id.*

a. Rule 8 vs. *Twombly* - A Short and Plain Statement vs. Plausibility

Rule 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). However, according to the Supreme Court, Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). In *Twombly*, the Supreme Court articulated, for the first time, a "plausibility" standard to be applied at the Motion to Dismiss stage. The factual allegations must state a "plausible" case. *Bell Atl. Corp.*, 550 U.S., 548-50. "Conclusory statements" are not factual allegations entitled to the presumption of being true. The Supreme Court rejected prior Supreme Court decisions that required a showing that the case should not be dismissed, "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." *Twobly*, at 557-60.

In *Iqbal*, the Supreme Court expanded this new "plausibility" standard to include qualified immunity cases. *Ashcroft v. Iqbal*, 556 U.S. 662, 684, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Indeed, *Iqbal* court indicated that *Twombly's* factual pleading standard should be applied broadly to all pleadings under the Federal Rule of Civil Procedure. *Id.*

Key to motions to dismiss under *Twombly/Iqbal* is to get the Court to adopt the position that the Plaintiff's statements of fact are "conclusory" and therefore not entitled to the presumption of truthfulness.

b. Plaintiff Has the Burden to Allege Sufficient Facts

Conclusions, unsupported by facts, are not entitled to the presumption of truth. *Davenport v. City of Garland*, No. 3:09-CV-798-B, 2010 WL 1779620, *2-3 (N.D. Tex. Apr. 9, 2010) report and recommendation adopted 3:09-CV-798-B, 2010 WL 1779619 (N.D. Tex. Apr. 20, 2010). Following *Twombly* and *Iqbal*, the plaintiff has the burden to alleged facts that show entitlement to relief. *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 183 (5th Cir. 2009). Well-plead facts that merely permit an inference of possible misconduct to not show entitlement to relief as required by Rule 8(a)(2). *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). Without enough facts to permit the inference of an official custom or policy that resulted in plaintiff's injuries, any claim for constitutional violations must fail. *Walker v. City of Dallas*, 336 Fed. App's 459 *1 (5th Cir. Jul. 7, 2009); *McClure v. Biesenbach*, 355 F. App'x 800, 803-04 (5th Cir. 2009).

c. Section 1983 Liability

As discussed above, a municipality cannot be held liable simply on a theory of *respondeat superior*. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Rather, liability attaches only "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." *Id*. at 694. Thus, to prevail on a §1983 claim, a plaintiff must show: (1) a policy or custom existed; (2) the governmental policy makers actually or constructively knew of its existence; (3) a constitutional violation occurred; and (4) the custom or policy served as the moving force behind the violation." *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 533 (5th Cir. 1996)*(*citing *Palmer v. City of San Antonio, Tex.*, 810 F.2d 514, 516 (5th Cir. 1987) *abrogated by Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993).

(1) How Much Does it Take to Make a Custom?

A municipality may be liable under §1983 if the execution of one of its customs or official policies deprives a plaintiff of his constitutional rights. *Monell*, 436 U.S. at 690-91. "Official policy" is defined as:

A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under §1983 unless they execute official policy as above defined. *Webster v. City of Houston*, 735 F.2d 838, 841 *on reh'g*, 739 F.2d 993 (5th Cir. 1984).

If the plaintiff has identified an official or formally announced policy adopted by the city to violate

the rights of citizens, it should be fairly clear in the complaint. If, however, the plaintiff only alleges a custom or practice, the plaintiff must demonstrate a "persistent widespread practice of city officials or employees which although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Webster*, 735 F.2d at 841.

A governmental entity can be sued and subjected to monetary damages under 42 U.S.C. §1983 only if its official policy or custom causes a person to be deprived of a federally protected right. *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997); *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

Usually, the plaintiff's allegations of policy or custom looks something like this: "The City has a policy or custom of tolerating the use of excessive force by its police officers. Theoretically, a "custom or policy" may take the form of either: (1) a single unconstitutional act by a policymaker, or (2) a pattern of conduct by a non-policymaker. *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 169 (5th Cir. 2010).

More than likely, the plaintiff's compliant will attempt to allege that there was a pattern of conduct by non-policymaker(s) that "occurred for so long and with such frequency that the course of conduct demonstrates the governing body's knowledge and acceptance of the disputed conduct." *Webster*, 735 F.2d at 842. Allegations sufficient to establish a pattern, "require[] similarity and specificity; prior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question." *Peterson v. City of Fort Worth*, 588 F.3d 838, 851 (5th Cir. 2009).

A pattern requires "sufficiently numerous prior incidents" and not just "isolated incidents." *Id.* The Fifth Circuit has "set the bar very high" for the number of prior incidents necessary for a finding of municipal liability. *Saenz v. Dallas County Community College District*, Civ. Action No. 3:10-CV-742-O, 2011 WL 1935742 *7 (N.D. Tex. May 16, 2011). But how high is "very high"? The Fifth Circuit has expressly found that even twenty-seven complaints over a four year period were not sufficient to establish a custom or practice. *Peterson*, 588 F.3d at 851 (twenty-seven complaints between 2002 and 2005 insufficient to establish a custom or practice) . Furthermore, the Fifth Circuit found no custom or practice based on eleven incidents. *Pineda v. City of Houston*, 863 F.2d 1180, 1184 (5th Cir. 1989)(no custom or practice based on eleven previous incidents).

Mere allegations of prior allegedly "similar" cases, without detail, are insufficient to establish a custom or policy. "The precedents make clear that to state a claim for relief against a municipality for an unwritten policy or custom of condoning unconstitutional acts by a policy officer, a plaintiff must plead prior incidents of similar acts." *Vouchides v. Houston Community College System*, 2001 WL 4592057, at *13 (S.D. Tex. Sep. 30, 2011)(finding that previous allegations of an officer "going off on people" was not sufficient similar to allegations of excessive force to support inference of custom or policy) citing *Peterson*, 588 F.3d at 851. (emphasis added) Furthermore, a short list of cases against the City does not support a reasonable inference of a "pattern of misconduct." *Saenz* 2011 WL 1935742, at *8. Even a long list of alleged transgressions make only make a "close call." See *Flanagan v. City of Dallas, Texas*, Civ. Action No. 3:13-CV-4231-M-BK, 2014 WL 4747952 (N.D. Tex. Sep. 23, 2014), where the Court found sufficient (although a "close call") ***allegations*** that: (1) the City of Dallas had a policy to shoot first and ask questions later; (2) a City Councilman informed the media of training issues within the department that had resulted in the killing of an individual; (3) Dallas is at the top of policy misconduct statistics in the South; (4) Dallas is ranked number 11 in police misconduct incidents; (5) that the total number of officer-involved shootings in Dallas was 144; (6) 86 grand juries had been convened to investigate police misconduct; (7) 60 unarmed African-American men had been killed by Dallas PD over a 13-year period; (8) at least 12 other shootings of unarmed individuals by Dallas PD had occurred during the year of the plaintiff's death; (9) there were 94 open Dallas PD investigations into officer-involved shootings. See also, *Oporto v. City of El Paso*, Civ. Action No. EP-10-CV-110, 2010 WL 3503457 *6 (W.D. Tex. 2010)(32 prior incidents of excessive deadly force over the span of 15 years was sufficient to survive a motion to dismiss).

Importantly, if the plaintiff's only alleged improper police action was the action taken against him/her, then the plaintiff does not state a policy or custom claim. See *Allen v. Burnett*, Civ. Action No. 12-CV-4863-O, 2013 WL 2151218, *3 (N.D. Tex. Feb. 25, 2013). A single incident does not show a policy or custom. *World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 753-54 (5th Cir. 2009).

(2) Actual or Constructive Knowledge of Policymaker

Where a custom has been established, knowledge must be attributable to a policymaker**.** See *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984). "Actual knowledge may b[e] shown by such means as discussions at council meetings or receipt of written information," while "[c]onstructive knowledge may be attributed to the governing body on the ground that it would have known of the violations if it had properly exercised its responsibilities, as, for example, where the violations were so persistent and widespread that they were the subject of prolonged public discussion or of a high degree of publicity." *Okon v. Harris County Hospital District*, 426 Fed. App'x, 312, 316 (5th Cir. 2011)(per curiam)(internal quotes omitted).

As with other elements of a complaint post-*Twombley*, "conclusory allegation[s] of knowledge are insufficient to identify a policymaker who can be charged with actual or constructive knowledge of the alleged custom." *Wright v. City of Garland*, 3:10-CV-01852-D, 2014 WL 5878940 *4 (N.D. Tex. Nov. 13, 2014) citing *Bennett*, 728 F.2d at 768. For example, mere assertions that the policymakers, "were aware that their custom and/or policy of condoning and tolerating its officers to commit civil rights violations would lead to more civil rights violations" is insufficient to plead actual or constructive knowledge attributable to a city. *Id*.

(3) Violation of Constitutional Rights Whose Moving Force is the Policy or Custom

The Fifth Circuit requires that the municipality's alleged indifference be the "moving force" that caused the specific constitutional violation. *Valle v. City of Houston*, 613 F.3d 536, 546 (5th Cir. 2010). In other words, the plaintiff must establish a "direct causal link" between the municipal policy and the constitutional injury. *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). "[The Fifth Circuit has] said that the connection must be more than a mere 'but for' coupling between cause and effect. The deficiency must be the actual cause of the constitutional violation. *Thompson v. Connick*, 578 F.3d 293, 300 (5th Cir.2009), rev'd on other grounds, 131 S.Ct. 1350, 179 L.Ed.2d 417 (2011).

7. Post-Answer Motions – Qualified Immunity MSJ

a. Early Dismissal (Even if not a Motion to Dismiss)

In contrast to the pre-answer motions, qualified immunity is specifically raised in the individual defendant's answer. However, the qualified immunity motion for summary judgment is often one of the first things decided by the court. Qualified immunity protects a defendant official not only from liability, but also from suit. Therefore, immunity questions should be resolved as early as possible in the litigation. *Anderson v. Creighton*, 483 U.S. 635, 646 n.5, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). In the Dallas Division of the Northern District of Texas, at least, the courts routinely issue specialized Scheduling Orders on the issue of qualified immunity. See, e.g., *Robinson v. City of Garland*, Document No. 72 ("Scheduling Order for Motions for Summary Judgment on the Issue of Qualified Immunity") 3:10-CV-24960M-BH (N.D. Tex. Dec. 31, 2014).

b. Freedom From the Burden of Discovery/Litigation

Bifurcated discovery is designed to preserve the individual defendants' ability to avoid the burdens of discovery until such time as the qualified immunity issue can be presented to the Court. See, *Ashcroft v. Iqbal*, 556 U.S. 662, 685-86, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

c. City is Relatively Free From Burdensome Discovery During QI Period as Well

During the period of qualified immunity discovery, the city is relatively free from burdensome discovery that often accompanies these suits. This is because the standard on a qualified immunity motion for summary judgment is that of a "reasonable officer." *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995). Therefore, the argument can be made that not only is discovery against the individual officer limited, but discovery against the city is limited to the facts of the incident. If the court is employing the "reasonable officer" standard, then that particular officer's training or employment history is not relevant. The city's policies, etc., are also not relevant.

d. Summary Judgment Standards on Qualified Immunity

Summary judgment is appropriate when there is no dispute as to any material fact, and one party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). A qualified immunity defense alters the summary judgment burden. *Buchanan v. Gulfport Police Department*., 2013 U.S. App. LEXIS 11314 *7 (5th Cir., Jun. 4, 2013). When a defendant asserts the defense of qualified immunity in a summary judgment motion, "[t]he moving party is not required to meet [his or her] summary judgment burden for a claim of immunity." *Hathaway v. Bazany*, 507 F.3d 312, 319 (5th Cir. 2007)(internal quotation marks and citations omitted). Rather, the movant need only plead his good-faith entitlement to qualified immunity, whereupon the burden shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law. *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). The qualified immunity inquiry has two prongs: (1) whether an official's conduct violated a Constitutional right of the plaintiff; and (2) whether that right was clearly established at the time of the violation. *Rockwell v. Brown*, 664 F.3d 985, 990-91 (5th Cir. 2011) cert. denied, 132 S.Ct. 1062 (2012).

The non-movant cannot merely rest on the allegations of the pleadings, but must establish that there are material controverted facts in order to preclude summary judgment. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Conclusory allegations, unsubstantiated assertions or the presence of a mere "scintilla of evidence" is not enough to create a real controversy regarding material facts. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 902, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990). In the absence of proof, the court cannot "assume that the nonmoving party could or would prove the necessary facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

(1) Whether the Official Violated the Plaintiff's Constitutional Rights

The first step "to decide whether [the defendant] is entitled to qualified immunity, the court must first answer the threshold question whether, taken in the light most favorable to [the plaintiff] as the part[y] asserting the injuries, the facts [] alleged show that [the defendant's] conduct violated a constitutional right. *Ellis v. Crawford*, Civ. Action No. 3:03-CV-2416-D, 2005 WL 525406 at *3 (N.D. Tex. Mar. 3, 2005). "If no Constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

(2) Whether the Official's Conduct Violates a Clearly Established Right of the Plaintiff

If a Constitutional violation could be made out on a favorable view of the parties's submissions, the next step "is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201. "Even if the government official's conduct violates a clearly established right, the official is nonetheless entitled to qualified immunity if his conduct was objectively reasonable." *Wallace v. County of Comal*, 400 F.3d 284, 289 (5th Cir. 2005). The objective reasonableness of the allegedly illegal conduct "is assessed in light of the legal rules clearly established at the time it was taken." *Salas v. Carpenter*, 980 F.2d 299, 310 (5th Cir. 1992).

The defendant official's acts are "held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the plaintiff's asserted constitutional or federal statutory right. *Cozzo v. Tangipahoa Parish Council--President Gov't*, 279 F.3d 273, 284 (5th Cir. 2002). Because the focus is on what the defendant would have known at the time of the incident, reasonableness is judged against the backdrop of the state of the law at the time of the conduct. *Brosseau v. Haugen*, 534 U.S. 194, 198 (2004). If the law at the time did not clearly establish that the official's conduct would violate the constitution, the official should not be subject to liability or, indeed, even the burden of litigation. *Id*. Thus, "[i]f the case law, in factual terms, has not staked out a bright line, qualified immunity almost always protect the defendant." *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997). The doctrine of qualified immunity protects, "all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 224, 227 (1991).

C. Unique Challenges of Dealing with the Unrepresented Person

Although not a tactic to get out of a lawsuit, many times these "early exits" come in lawsuits filed by citizens *pro se.* One of the unique aspects of public entity litigation is the large number of litigants who find their way to the courthouse *sans* counsel. Therefore, it is appropriate to briefly discuss the issue of dealing with the unrepresented.

Pro se plaintiffs (and, on occasion, defendants) offer a variety of challenges for the litigator. These are often the most difficult cases to resolve outside the courtroom, either because the plaintiff is a "true believer" or simply does not understand the process. We often spend more time listening to unrepresented Plaintiffs opine as to what the law "should be" rather than discussing what the law actually is and how we could apply it to the case.

1. Ethical Duties When Dealing with an Unrepresented Person.

While most challenges created by the *pro se* plaintiff are practical, there are some ethical considerations that come in to play. Many *pro se* plaintiffs misunderstand the role of the City Attorney. Often, they believe that, as a citizen and resident of a city, the city attorney is there for them. This, of course, is not the case.

State Bar Rule 4.03 states that:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. Rule of Professional Conduct 4.03

The comment goes even further, advising that the lawyer should not give advice to the unrepresented person, "other than the advice to obtain counsel." Comment to Rule 4.03 of the Texas Rules of Professional Conduct.

The attorney representing the city, therefore, should be very careful in speaking with the unrepresented. Avoid anything that would appear to be legal advice.

2. *Pro Se* Litigants Get the Benefit of the Doubt.

When a plaintiff is proceeding *pro se*, the Court must construe the allegations in the complaint "liberally." *Hughes v. Rowe*, 449 U.S. 5, 9, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980)(per curiam); *S.E.C. v. AMX, Int'l, Inc.*, 7 F.3d 71, 75 (5th Cir. 1993)(per curiam). "[*P]ro se* litigant[s] [are] subject to less stringent standards than [those] represented by counsel. *AMX, Int'l, Inc.*, 7 F.3d at 75 (citing *Hughes*, 449 U.S. at 9). However, while the court is to liberally construe the pleadings of *pro se* litigants, *pro se* parties are not exempt from complying with the court rules of procedural and substantive law. *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981)(citing *Faretta v. California*, 422 806, 834 n.46 (1975)).